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Supreme Court, U.S.
FILED

AUG 20 2010

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No. 10-262

In the

Supreme Court of the United States

WILLIAM WILCOX and SHIRLEY WILCOX, his Wife,
Petitioners,

v.

JEREMIAH FENN, OSCAR GILLIAM, and DOUGHERTY COUNTY, GEORGIA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the lower court correctly held – in conflict with this Court's decision in *Sacramento v. Lewis* and the views of eight other federal circuits – that a federal civil rights claim predicated on Fourteenth Amendment Substantive Due Process requires proof of an "intent to harm" (as opposed to "deliberate indifference" to a substantial, state-created risk of severe injury or death) when the government official had an adequate opportunity to deliberate about the constitutionality of his conduct and where the official's conduct served no legitimate governmental objective.

PARTIES TO THE PROCEEDINGS

The parties are as identified in the caption.

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William and Shirley Wilcox respectfully petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Court of Appeals' opinion is unreported. Petition Appendix 1a – 5a. (Pet. App.) The District Court's opinion is unreported. Pet. App. 6a – 20a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 25, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, amend. 14, Sec. 1, provides in relevant part:

> . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . .

Section 1983 of Title 42 of the United States Code provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and

> laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ....

STATEMENT

1. This case comes to the Court following the District Court staying discovery then granting judgment on the pleadings on William Wilcox's claim under 42 U.S.C. § 1983 for violation of his Fourteenth Amendment right to Substantive Due Process. Therefore, the facts alleged in Petitioner's complaint, many of which Respondents admitted, are accepted as true and viewed in the light most favorable to petitioners. *Abdur-Rahman v. Walker*, 567 F.3d 1278, 1280-81 (11th Cir. 2009).

On April 23, 2007, Respondents Jeremiah Fenn and Oscar Gilliam, officers of the Dougherty County Georgia Police Department (Albany, GA), were assigned to participate in a joint police operation in Savannah, GA ("Operation Rolling Thunder"), the purpose of which was to establish a large police presence on Savannah roads to deter speeding and a resulting increase in traffic accidents and fatalities. Pet. App. 27a.

To get to Savannah, Respondents left Albany heading eastbound on I-16. They were driving in tandem, á la NASCAR, between 90 and 100 miles per hour in separate police vehicles for an extended time. They were not responding to any emergency call, pursuing any suspect or even engaging in any investigatory work; they had activated neither their sirens nor flashing lights as required by state statute and departmental SOPs; they acted after actual

deliberation; they were not balancing any competing obligations as police officers; and they had no legitimate governmental objective for their illegal conduct. Instead, they were simply driving from Albany to Savannah. Pet. App. 27a-28a., ¶¶ 16, 17, 18, 20, 21; 31a; 32a-33a, ¶¶ 35, 36.

At the same time, William Wilcox was driving his Toyota 4Runner towing a U-Haul trailer eastbound on I-16 at or below the posted speed limit of 70 miles per hour. His son Milton was a passenger. Pet. App. 27a, ¶ 15.

Respondent Gilliam was in the lead patrol car, a marked SUV. As he approached Wilcox's vehicle from behind, he suddenly changed lanes to pass the Wilcox vehicle and did so in a manner that made it likely that Fenn would not be able to avoid colliding with Wilcox's vehicle. Fenn then struck Wilcox's vehicle from behind causing Wilcox to lose control and his vehicle to roll several times. Milton Wilcox was ejected from the vehicle and died; William Wilcox suffered severe spinal cord injury. Pet. App. 28a., ¶¶ 19, 22; 31a, ¶ 30.

Fenn was later charged with vehicular homicide. Pet. App. 54a—54a. *See* O.C.G.A. §40-6-393B, which requires proof that the defendant "cause[d] the death of another person, without an intention to do so."

2. Petitioners filed suit in federal District Court alleging, *inter alia*, violations of their federal civil rights. Relevant to this appeal, Count II alleged that Respondents had violated Petitioners' Fourteenth Amendment due process right to be free from unreasonable, arbitrary and capricious abuses of power by executive officials. Pet. App. 30a., ¶ 28.

Respondents answered and admitted several critical facts: (1) that they had been driving on I-16 for an extended time before approaching the Wilcox vehicle from behind, Pet. App. 27a, ¶ 18; 45a, ¶ 15 – 18, (2) that the impact with Fenn's vehicle caused William Wilcox to lose control of his vehicle and caused William's severe injury and Milton's death, Pet. App. 28a, ¶ 22; 45a, ¶ 22, and (3) that their conduct "was an abuse of official power that is arbitrary in a constitutional sense." Pet. App. 34a, ¶ 38; 47a, ¶ 38.

3. In granting Respondents' motion for judgment on the pleadings, the District Court accepted that Respondents "intentionally violated the speed limit and drove with reckless disregard for the safety of others." Pet. App. 18a. As to Petitioners' Fourteenth Amendment claim, the District Court acknowledged that in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), this Court recognized that executive misconduct could rise to the level of a constitutional tort when it was "arbitrary or conscious-shocking." It also acknowledged that *Lewis*, in a footnote, cited a Fifth Circuit precedent for the proposition that a police officer's intentional misuse of his vehicle resulting in physical injury might state a constitutional claim. *Lewis*, n. 13 (citing *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986)). Nonetheless, the District Court concluded that it was bound by the Eleventh Circuit's pre-*Lewis* precedent in *Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986). In the District Court's view, *Cannon* held that an innocent motorist injured by a police officer responding to a disturbance call at a pool hall could not prevail under a Fourteenth Amendment theory unless the motorist could show that the officer intended to harm her. Although Respondents, unlike the officer in *Cannon*, were not responding to an

emergency or even routine call (or otherwise engaging in any pursuit or even investigation), the District Court found this distinction to be irrelevant under *Lewis*.

4. The Court of Appeals affirmed. In a brief *per curiam* opinion, [unpub. mem.] the court rejected Petitioners' Fourteenth Amendment claim because they failed to allege that Respondents intended to harm them. The Court rejected Petitioners' argument that a "deliberate indifference" standard (rather than an "intent to harm" standard) should govern cases where (unlike *Lewis*) the officers have no lawful basis for their conduct and are not engaged in a high-speed chase (or some other law enforcement activity which deprives them of a sufficient opportunity to deliberate about their conduct). The Court anchored its opinion on two of its own pre-*Lewis* precedents: *Cannon* (on which the District Court had relied) and *Rooney v. Watson*, 101 F.3d 1378 (11th Cir. 1996) (which extended the rule announced in *Cannon* to a non-emergency, non-pursuit situation). The court further repeated that negligence, or even gross negligence is not enough, despite *Lewis* statement that sometimes gross negligence and deliberate indifference could be sufficient. *Lewis* at 849-851.

REASONS FOR GRANTING THE PETITION

This Court should grant *certiorari* for three reasons. First, the decision below conflicts with this Court's decision in *Lewis* and, thus, warrants summary reversal. Second, to the extent it does not conflict with *Lewis*, the decision below widens a conflict between the Eleventh Circuit and all the other federal appellate courts over the proper application of

Lewis's "intent to harm" standard to Substantive Due Process claims when the government official had a sufficient opportunity for actual deliberation about and no legitimate governmental purpose for his conduct. Third, this petition presents a clean vehicle with which to resolve these conflicts.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *LEWIS* AND WARRANTS SUMMARY REVERSAL.

Federal law authorizes a cause of action where a person acting under color of law deprives a citizen of a right secured by the Constitution. 42 U.S.C. § 1983. The Fourteenth Amendment secures the right to be free from deprivations of life or liberty without due process of law, which includes the right to be free from arbitrary and capricious executive action. *See e.g. Lewis* at 840; *Ingraham v. Wright*, 430 U.S. 651, 672-673 (1977).

Lewis explained the scope of this constitutional right in the context of a high-speed police chase of a motorcycle. There, the victim, the motorcycle passenger, died when he was thrown from the motorcycle and then hit by one of the pursuing police cars. The Court held that "high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment ...." 523 U.S. at 854.

The Court gave several reasons for the "intent to harm" requirement. First, in certain contexts (like high-speed pursuits or prison riots), law enforcement officials must necessarily make decisions "in haste, under pressure, and frequently without the luxury of

a second chance." *Id.* at 852 (quoting *Whitley v. Albers*, 475 U.S. at 320). Second, in those same contexts, law enforcement officials "have obligations that tend to tug against each other." For example, in a high-speed chase, officers must balance their obligation to apprehend the suspect against their obligation to avoid harm to innocent bystanders. *Id.* Finally, the Court set a high-bar in recognition of the "legitimate object" of the pursuit – namely apprehension of the suspect – and that a more relaxed culpability standard could discourage police from pursuing suspects and encourage suspects to flee hoping the police would not give chase.

The Court contrasted high-speed pursuits with other cases that warranted a more relaxed culpability standard. For example, the Court noted that in many prison settings where the State is responsible for an inmate's welfare (such as physical safety and medical care), deliberate indifference is the appropriate culpability standard. Additionally, the Court observed that a more relaxed standard is appropriate "when actual deliberation is practical." *Id.* at 851. Finally, in a footnote, the Court suggested that a law enforcement official's intentional misuse of his implements might be sufficient. The Court quoted from a Fifth Circuit opinion: "Where a citizen suffers physical injury due to a police officer's *negligent use* of his vehicle, no section 1983 claim is stated. It is a different story when a citizen suffers . . . physical injury due to a police officer's *intentional misuse* of his vehicle." *Id.* at

854 n. 13 (*Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986)).[1]

Under *Lewis*, the "intent to harm" standard is clearly inappropriate for this case; instead, a more relaxed culpability standard of "deliberate indifference" is warranted. None of the reasons for the "intent to harm" standard apply here. First, Respondents did not confront a situation requiring them to make a split-second judgment – they were not engaged in a pursuit; nor were they responding to an emergency or even a routine call. Indeed, they were not responding to any call at all. Second, consequently, Respondents were not required to balance any competing obligations. Their participation in Operation Rolling Thunder did not require or otherwise justify the need for them to travel to Savannah at a dangerously high and illegal speed. Finally, Respondents' act of flagrantly speeding in tandem served no legitimate law enforcement objective, and, in fact, knowingly violated numerous state statutes and departmental SOPs that forbid this conduct. Indeed, as noted above, Respondents admitted in their answer that their conduct "was an abuse of official power that is arbitrary in a constitutional sense." Pet. App. 34a, ¶ 38; 47a, ¶ 38. And, Fenn was charged with vehicular homicide. Pet. App. 50a – 54a.

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[1] The District Court held that " 'intentional misuse' does not mean, ... any improper use that is also purposeful on the officer's part." Rather, "intentional misuse" means "the manner an officer is using their vehicle is directed at the party alleging harm." Pet. App. 17a. The Eleventh Circuit did not address this issue.

This case fits quite comfortably in the category of cases that *Lewis* indicated warranted the more relaxed standard of deliberate indifference. Respondents admitted they had an ample opportunity to deliberate – both when they initially decided to drive 90–100 miles per hours and when they continued to do so (as noted above, Respondents admitted that they had been driving "for an extended time before approaching [Wilcox's] vehicle from behind." Pet. App. 27a, ¶ 18, 45a, ¶ 15-18. Respondents approached Wilcox (and certainly others) from behind, each time giving them every reason and opportunity to deliberate on whether to drive in tandem at a dangerously high and illegal speed. *Compare Rooney v. Watson*, 101 F.3d 1378 (11th Cir. 1996), a pre-*Lewis* case relied on by the Eleventh Circuit below. Moreover, this is precisely the sort of case *Lewis* noted as an exception to the intent to harm standard where the victims suffered "physical injury due to [Respondents'] intentional misuse of [their] vehicle[s]" (as evidenced both by Respondents' admission that they were acting in an arbitrary manner and in the prosecution of Respondent Fenn for vehicular homicide). In short, this case represents the paradigmatic abuse of official power that, under *Lewis*, does not require proof of "intent to harm."

In the face of this reasoning, the Eleventh Circuit's stubborn and unreflective extension of its pre-*Lewis* precedents (*Cannon* and *Rooney*) cannot be sustained. While the lower court was "unpersuaded that this distinction merits a different standard or result in this case," Pet. App. 5a, *Lewis* makes clear that a world of difference separates the two scenarios.

An innocent bystander injured during a high-speed chase presents precisely the sort of "competing obligations" that under *Lewis* necessitated a high level of culpability, i.e., an intent to harm, in order not to discourage the officer from completing a justified pursuit. By contrast, Wilcox's situation presents no competing obligations for the officers, and the officers' conduct that created the substantial risk of severe injury or death and caused that very harm was not in the service of any legitimate law enforcement activity, but, in fact, the result of the officers violating the law solely because as police officers they could get away with it. Pet. App. 32a, ¶¶ 34, 35.

Thus, the lower court's opinion fails to conduct the "exact analysis of the circumstances" required by *Lewis* to determine the proper level of culpability in cases falling in the "middle range" between the high-speed pursuit and custodial treatment. 523 U.S. at 849-850. Under the lower court's logic, Respondents could fire their weapons in the air as part of some personal celebration while on duty and if the descending bullets hit someone, the Respondent's misconduct would not be actionable arbitrary conduct under the Fourteenth Amendment unless the victim could prove the Respondents "intended to harm" him.

Such a view makes a mockery of this Court's jurisprudence and licenses the very abuses of official power that the Fourteenth Amendment was designed to prevent. As this Court said in *Ingraham v. Wright*, 430 U.S. 651, 672-673 (1977):

> ...[T]he Due Process Clause of the Fifth Amendment, later incorporated into the Fourteenth, was intended to give Americans at

> least the protection against governmental power that they had enjoyed as Englishmen against the power of the Crown. ... includ[ing] the right generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. Among the historic liberties so protected was a right to be free from and to obtain judicial relief for unjustified intrusions on personal security. . . . Under the 39th Article of the Magna Carta, an individual could not be deprived of this right of personal security 'except by the legal judgment of his peers or by the law of the land.' "

Id. at n. 41 (internal quotations and citations omitted).

Lewis emphasized that substantive due process: (1) "was intended to prevent government officials from abusing [their] power, or employing it as an instrument of oppression," *Id.* at 840 (internal quotations and citations omitted.); (2) protects against "arbitrary action," quoting *Bank of Columbia v. Okely*, 17 U.S. 235 (1819); that ". . . the words from Magna Charta, . . . were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice." (internal quotations and citations omitted.); and (3) protects against the arbitrary "exercise of power without any reasonable justification in the service of a legitimate governmental objective," *Lewis* at 846.

Summarily reversing the judgment below on grounds that the lower court applied the wrong culpability standard and directing the lower court to

apply the correct *Lewis* standard does not risk turning § 1983 into a font of tort law. Nor does it require a full examination of when and precisely what the standard of culpability is for cases not involving a high-speed pursuit. Respondents were not merely negligent, or even grossly negligent. As the District Court accepted, Respondents "intentionally violated the speed limit and drove with reckless disregard for the safety of others." Pet. App. 18a. Respondents have admitted their conduct was an arbitrary abuse of official power. Pet. App. 34a, ¶ 38; 47a, ¶ 38. *Compare Farmer v. Brennan*, 511 U.S. 825 (1994) (defining deliberate indifference in a prison rape case as the equivalent of recklessly disregarding a substantial risk of serious harm).

Summary reversal to apply the appropriate standard of culpability will correct this patent misapplication of the *Lewis* "intent to harm" standard in a truly tragic case for which it was never meant. It will not require sorting out other more troublesome issues shown in the next section regarding the conflicts which exist among the circuits on the proper standard of culpability in non-pursuit police driving cases.

II. IF *LEWIS* DOES NOT WARRANT SUMMARY REVERSAL, THEN *CERTIORARI* IS APPROPRIATE TO RESOVE THE WIDENING CONFLICT BETWEEN THE ELEVENTH CIRCUIT'S DECISION BELOW AND THE OTHER FEDERAL APPELLATE COURTS ABOUT THE SCOPE OF THE *LEWIS* "INTENT TO HARM" RULE.

If this Court concludes that *Lewis* does not warrant summary reversal, then it should grant the petition. The lower court's rule widens a conflict among the lower federal appellate courts over the proper scope of the *Lewis* rule.

Specifically, when does a culpability standard other than "intent to harm" determine whether executive action is "arbitrary or shocks the conscience?" Several circuits have observed that "[t]he Supreme Court has not fully explicated the standard of culpability in substantive due process cases generally... ." *Sanford v. Siles*, 456 F.3d 298, 305 (3d Cir. 2006). *See also Pena v. Deprisco*, 432 F.3d 98, 112 (2d Cir. 2005) ("[*Lewis*] does not provide a comprehensive scheme for determining the propriety of official conduct ... ."). A survey of federal appellate authority in the twelve years since *Lewis* was decided reveals three different, outcome-determinative approaches.

The majority of circuits, taking their cue from *Lewis*, apply the deliberate indifference standard where law enforcement officers have had a sufficient opportunity to deliberate before engaging in conduct that caused the harm. Seven circuits, the Second, Third, Seventh, Eighth, Ninth, Tenth and D.C., adhere

to this view.[2] The Third Circuit's exhaustive opinion in *Sanford* illustrates this approach. After canvassing its pre- and post-*Lewis* precedents as well as the decisions of other appellate courts, the Third Circuit announced the following approach:

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[2] *See, e.g., Pena v. Deprisco*, 432 F.3d 98, 114 (2d Cir. 2005); *Sanford v. Stiles*, 456 F.3d 298, 309 (3d Cir. 2006) (*per curiam*) ("[I]n cases where deliberation is possible and officials have the time to make an 'unhurried judgment' deliberate indifference is sufficient.") (footnote omitted); *Carter v. Simpson*, 328 F.3d 948, 952 (7th Cir. 2003) ("In situations where actual deliberation is possible, conduct that is 'deliberately indifferent' may 'shock the conscience;' in emergency situations (such as high-speed chases), however, conduct 'shocks the conscience' only if there was intent to cause of harm."); *Terrell v. Larson*, 396 F.3d 975, 978 (8th Cir. 2005) (*en banc*) (holding that application of deliberate indifference standard is appropriate where actual deliberation is practical whereas "intent to harm" standard applies in rapidly evolving, fluid and dangerous situations which preclude the luxury of calm and reflecting deliberation"); *Tennison v. City and County of San Francisco*, 570 F.3d 1070, 1089 (9th Cir. 2008) ("In determining whether deliberate indifference is sufficient to shock the conscience, or whether the more demanding standard of purpose to harm is required, the critical consideration is whether the circumstances are such that actual deliberation is possible." (citations and internal quotations omitted); *Green v. Post*, 574 F.3d 1294, 1302 (10th Cir. 2009) (deliberate indifference standard sufficient where police had "sufficient time to actually deliberate"); *Radecki v. Barela*, 146 F.3d 1227, 1231 (10th Cir. 1998) ("We are directed to employ the "deliberate indifference" standard only when actual deliberation is practical."); *Butera v. District of Columbia*, 235 F.3d 637, 280 (D.C. Cir. 2001) (applying deliberate indifference standard where state officials created danger and actual deliberation is practical). The Fifth Circuit would appear to follow this view but has not resolved the question definitively in a post-*Lewis* reported opinion. *See Daniels v. City of Dallas*, 272 Fed. Appx. 321 (5th Cir. 2008).

> The level of culpability required to shock the conscience increases as the time state actors have to deliberate decreases. In a "hyperpressurized environment," an intent to harm is usually required. On the other hand, where deliberation is possible and officials have time to make "unhurried judgments," deliberate indifference is sufficient. ...

456 F.3d at 309.[3]

A smaller group of circuits – the First and the Sixth – apply a multi-factor balancing test to determine the proper culpability standard.[4] The Sixth Circuit's decision in *Hunt v. Sycamore Community School District Board of Education,* 542 F.3d 529 (6th Cir. 2008), is illustrative. There, the court derived from *Lewis* and its prior precedents a standard to decide whether a Fourteenth Amendment claim would lie in an executive misconduct case not involving an intent to harm:

> (1) The voluntariness of the relationship between the government and the plaintiff,

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[3] The Court identified a different culpability standard for a third set of cases, not relevant here.

[4] *See, e.g., Cummings v. McIntire*, 271 F.3d 341, 345 (1st Cir. 2001) (applying multi-factor test to determine requisite level of culpability in Fourteenth Amendment case involving neither "high-speed police pursuit" nor "ordinary custodial situation"); *Hunt v. Sycamore Community School District Board of Education*, 542 F.3d 529, 536 (6th Cir. 2008) (applying three-factor test to decide whether official misconduct shocks the conscience where it does not entail an intent to harm).

> especially whether the plaintiff was involuntarily in government custody or was voluntarily a government employee; (2) whether the executive actor was required to act in haste or had time for deliberation; and (3) whether the government actor was pursuing a legitimate government purpose.

Id. at 536. Unlike the majority approach, this multi-factor approach downplays the centrality of the haste/deliberation distinction. *See id.* at 540 ("This discussion about decisions made in haste and under pressure is a corollary to the theme that bad government decisions are not due process violations unless they are arbitrary, meaning that there is no legitimate reason for them.").

Finally, the Eleventh Circuit (much like the Ninth Circuit in *Lewis*) stands alone. It is the only circuit that applies the "intent to harm" standard even where (as here) officers had ample opportunity to deliberate and their conduct served no legitimate law enforcement purpose. A survey of Eleventh Circuit case law reveals that the decision below is not an isolated incident. On several other occasions, the Eleventh Circuit has applied a strict "intent to harm" standard in circumstances far beyond those presented by *Lewis* and where other federal appellate courts would not. *See, e.g., Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003) (victim shot by police during pursuit); *Rooney*, 101 F.3d 1378 (victim injured by speeding police car not responding to emergency or engaged in pursuit – relied on for the decision below); *Best v. Cobb County Georgia*, 239 Fed. Appx. 501 (11th Cir. 2007) (unpub. mem.) (victim injured by pursued automobile rather than police); *White v. Polk County*, 207 Fed.

Appx. 977 (11th Cir. 2006) (unpub. mem.) (passenger killed after officer followed car at high speed for fifteen miles but never activated emergency lights or siren). *But compare, Waddell v. Hendry County Sheriff's Office*, 329 F.3d 1300, 1306 (11th Cir. 2003).[5] Indeed, one federal circuit has observed that the Eleventh Circuit's application of the "intent to harm" standard has at times been "without analysis." *Green v. Post*, 574 F.3d 1294, 1309 (10th Cir. 2009).

In contrast to the Eleventh Circuit, the other circuits would not have required a showing of "intent to harm" in the Wilcox's case. The majority of courts, tracking the Third Circuit's view, would not have done so because Respondents were not operating in a "hyperpressurized environment." Courts employing the multi-factor test like the Sixth Circuit would have reached a similar conclusion. Not only did Respondents have "time for deliberation," they were not pursuing any legitimate governmental purpose.

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[5] The defendant officers released an inmate with an extensive criminal record including a DUI conviction to act as a paid confidential informant to buy drugs. During an operation he drove drunk and caused a fatal accident. Waddell alleged, *inter alia*, that the defendants "had acted with willful and wanton disregard for the safety of the public and with willful indifference ... and with gross negligence and deliberate indifference to foreseeable damage." Id. at 1304. While emphasizing it was not deciding the appropriate standard of review, the court said: "In this non-custodial setting, a substantive due process violation would, at the very least, require a showing of deliberate indifference to an extremely great risk of serious injury to someone in Plaintiffs' position." Id. at 1306 (footnote omitted). The court held that the facts of the case did not meet even that lesser standard. *Compare Pena v. Deprisco*, 432 F.3d 98, 114 (2d Cir. 2005).

See Caldwell v. City of Louisville, 120 Fed. Appx. 566 (6th Cir. 2004) (unpub. mem.) (finding sufficient evidence of Fourteenth Amendment violation where police officer refused to serve warrant on victim's boyfriend because victim had filed misconduct allegation against officer).

The Second Circuit's decision in *Pena* illustrates well the outcome-determinative effect of the choice of culpability standard. That case involved a Fourteenth Amendment claim against police officers who had encouraged their off-duty colleague to drink excessively; thereafter, he drove his police vehicle in an inebriated condition, ran several red lights, and struck another car, killing the victim. To determine whether the encouraging officers' conduct shocked the conscience, the Second Circuit (unlike the Eleventh Circuit) did not apply *Lewis*'s strict "intent to harm" standard. Instead, reasoning that the case did not involve a pressurized situation or competing obligations, the court found that it is:

> sufficient to assert that the defendants created a serious danger by acting with deliberate indifference to it. *Whether termed "deliberate indifference" or recklessness," this mental state is sufficient to establish liability in such cases* "because it requires proof that the defendant focused upon the risk of unconstitutional conduct and deliberately assumed or acquiesced in such a risk."

432 F.3d at 114 (emphasis added). *Compare Farmer v. Brennan*, 511 U.S. 825 (1994).

Here too, the Second Circuit would have reached a different result on the facts of Wilcox's case. Much like encouraging responsible drinking by a fellow officer, driving in a legal, non-reckless manner "does not ordinarily clash with other equally important governmental responsibilities." *Id.* (citations omitted). Like the defendants in *Pena*, Respondents had "ample opportunity ... during the day in question ... to decide what to do . . . ." Moreover just as awareness about the dangers of drunk driving "does not require a sophisticated exercise in judicial notice," *id.*, so too does the officer's duty assignment to the "H.E.A.T. unit" to combat aggressive driving and the very purpose of Operation Rolling Thunder – to deter excessive speeding that had resulted in an increase of traffic fatalities – demonstrate that these officers were keenly aware of the dangers associated with their reckless driving. Here, as in *Pena*, it "was not only feasible, it was obligatory for [Respondents] to avoid" the dangers associated with driving at dangerously high and illegal speeds well in excess of the posted limit when no legitimate law enforcement obligation required or could possibly justify it. *Id.*

Thus, this Court should grant *certiorari* in order to resolve a conflict among the circuits over important questions about the proper scope of the *Lewis* rule when the government official has ample opportunity for deliberation and no competing obligations and the conduct has no legitimate government purpose.[6]

---

[6] The Fourth Circuit has not clearly articulated a view on this question.

III. THIS CASE OFFERS AN IDEAL VEHICLE FOR RESOLVING THESE CONFLICTS.

For four reasons, this case presents an ideal vehicle for resolving the conflicts with this Court's and the other federal appellate circuits' decisions.

First, the record is clean. The case comes to the Court following judgment on the pleadings with only the allegations in the complaint and critical admissions in the answer to consider.

Second, Respondents' admissions of critical facts in the case simplify the issues. As noted above, Respondents have conceded that their conduct caused the death and injures and that it was "arbitrary in a constitutional sense."

Third, potential complications are absent. Because the lower court resolved the case on the ground that Respondents did not violate Wilcox's Fourteenth Amendment right, the Court need not wade into questions of whether that right is clearly established.[7]

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[7] The question of whether the law is clearly established is a matter of qualified immunity, which requires the defendant to establish that he was acting within his discretionary authority. If he does not, "he is not entitled to qualified immunity regardless of whether the law in a given area was clearly established." *See e.g. Harbert International, Inc. v. James,* 157 F.3d 1271, 1281 (11th Cir. 1998). Because the District Court stayed discovery, there is no evidence of record on the question of the respondents' discretionary authority. That issue is properly left to the District Court.

Fourth, this case presents a minority rule of one. Like the Ninth Circuit in *Lewis*, the Eleventh Circuit has established itself as the lone voice, with respect to both the clear commands of this Court and its sister circuits.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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August 20, 2010

APPENDIX

APPENDIX

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 09-12226
Non-Argument Calendar

D.C. Docket No. 08-00020-CV-WLS-1

[Filed May 25, 2010]

WILLIAM WILCOX, Individually, SHIRLEY WILCOX, His Wife,	)
Plaintiffs-Appellants,	)
versus	)
JEREMIAH FENN, Individually and in his Official Capacity as a Dougherty County Police Officer, OSCAR GILLIAM, Individually and in his Official Capacity as a Dougherty County Police Officer, DOUGHERTY COUNTY, GA, a political Subdivision of the State of Georgia,	)
Defendants-Appellees.	)

Appeal from the United States District Court

for the Middle District of Georgia
(May 25, 2010)

Before EDMONDSON, MARCUS and ANDERSON, Circuit Judges.

PER CURIAM:

William Wilcox appeals the dismissal of his civil rights complaint, 42 U.S.C. § 1983. No reversible error has been shown; we affirm.

Wilcox was involved in a car accident with Dougherty County police officer Jeremiah Fenn. Wilcox alleged that, while he was driving on Interstate 16, officer Oscar Gilliam rapidly approached him from behind. Fenn was driving behind Gilliam. The officers were not responding to an emergency and had not activated their flashing lights or sirens.[1] Gilliam, traveling over 90 miles per hour, suddenly changed lanes to pass Wilcox in a manner that caused Fenn to collide with Wilcox's vehicle. Wilcox lost control of his vehicle and suffered severe spinal cord injuries.[2]

Wilcox alleged that the officers' acts constituted an abuse of official power, resulting in the deprivation of Wilcox's Fourteenth Amendment substantive due process right to life, liberty, and property. Wilcox also alleged that Dougherty County violated his

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[1] Wilcox alleged that the officers were driving to Savannah to participate in "Operation Rolling Thunder," a large scale program to deter speeding on highways.

[2] In addition, Wilcox's son, a passenger in the vehicle, died as a result of the accident.

constitutional rights by failing to train properly Fenn and Gilliam.

The district court granted Defendants' Fed.R.Civ.P. 12(c) motion for judgment on the pleadings and dismissed the complaint because Wilcox's allegations were not actionable under section 1983.[3] "We review de novo a district court's entry of judgment on the pleadings, accepting the facts in the complaint as true and viewing them in the light most favorable to the nonmoving party." Abdur-Rahman v. Walker, 567 F.3d 1278, 1280-81 (11th Cir. 2009).

Officials acting under the color of state law violate the substantive component of the Due Process Clause only when their conduct "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." County of Sacramento v. Lewis, 118 S.Ct. 1708, 1717 (1998) (in the context of a high speed police pursuit of a suspect). The Supreme Court has made clear "that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm." Id. Indeed, "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." Id. at 1716 (quotation and citation omitted). We have stressed in our own cases that section 1983 must not be used "as a 'font of tort law' to convert state tort claims into federal causes of action." Waddell v. Hendry County Sheriff's Office, 329 F.3d 1300, 1305 (11th Cir. 2003). We also have noted that "even intentional wrongs seldom violate the Due

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[3] The district court also declined to exercise pendant jurisdiction over Wilcox's state law negligence claim.

Process Clause." Id. Briefly stated, "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." Lewis, 118 S.Ct. at 1718.

Here, we conclude that the district court committed no error in granting Defendants' motion for judgment on the pleadings: Wilcox's allegations did not state a claim of constitutional dimension. Though Defendants here may have driven recklessly, we have concluded that "a person injured in an automobile accident caused by the negligent, or even grossly negligent, operation of a motor vehicle by a policeman acting in the line of duty has no section 1983 cause of action for violation of a federal right." Cannon v. Taylor, 782 F.2d 947, 950 (11th Cir. 1986).[4] Defendants' act in driving over the speed limit when not pursuing a suspect or responding to an emergency may have been negligent -- or even grossly negligent -- but was not so "egregious" as to be "arbitrary in the constitutional sense." Lewis, 118 S.Ct. at 1717-18.

Wilcox argues that his case is distinct from police pursuit and emergency response cases because Defendants here were not balancing countervailing safety interests, had time to deliberate on their acts, and knew that their acts would pose a grave danger to people like Wilcox. Thus, he contends, the district court should have evaluated whether the officers' acts were deliberately indifferent to a great risk of a known

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[4] In Cannon, an officer responding to an emergency call drove at a high rate of speed without using his lights or siren and caused the death of a person crossing an intersection. Id. at 948.

danger instead of whether the officers possessed an intent to harm Wilcox. See, e.g., Waddell, 329 F.3d at 1306 (explaining that, in certain non-custodial settings, to show a substantive due process violation, a plaintiff must show, at the very least, "deliberate indifference to an extremely great risk of serious injury to someone in Plaintiffs' position").

But we are unpersuaded that this distinction merits a different standard or result in this case. In Rooney v. Watson, 101 F.3d 1378 (11th Cir. 1996), an on-duty police officer (who was speeding, but was engaged in no police pursuit or emergency response) caused an automobile accident. Id. at 1379. Relying on Cannon, we concluded that the officer's single accident, whether characterized as negligence or gross negligence, did not amount to a constitutional deprivation; and no section 1983 cause of action existed. Id. at 1380-81. The officer was on duty and on patrol when the accident occurred, as were the officers in Wilcox's case.

As in Rooney, we see no reason to adopt a different standard to apply to Wilcox's circumstances.

Because Wilcox's claim against Dougherty County for improper training was dependent on the viability of his section 1983 claim against the officers, the district court correctly granted judgment on the pleadings on this claim too.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA ALBANY DIVISION

No. 1:08-CV-20(WLS)

[Filed March 30, 2009]

WILLIAM WILCOX, individually, and, SHIRLEY WILCOX, his wife,

Plaintiffs,

vs.

JEREMIAH FENN, *et al.*,

Defendants.

ORDER

Presently pending before the Court are Defendants' Motion for Judgment on the Pleadings, Plaintiffs' Motion to Set Briefing Schedule, Plaintiffs' Motion for Summary Judgment, Plaintiffs' Motion for Partial Summary Judgment, and Plaintiffs' Motion for Issuance of Letters Rogatory. (Docs. 10, 6, 17, 20, 26).

For the reasons addressed below: Defendants' Motion for Judgment on the Pleadings (Doc. 10) is

GRANTED; Plaintiffs' Motion to Set Briefing Schedule (Doc. 6), Plaintiffs' Motion for Summary Judgment (Doc. 17), Plaintiffs' Motion for Partial Summary Judgment (Doc. 20), and Plaintiffs' Motion for Issuance of Letters Rogatory (Doc. 26) are all **DENIED as MOOT**.

BACKGROUND

Based upon the facts alleged in the Complaint (Doc. 1), as set forth in relevant part below, Plaintiffs bring this action pursuant to 42 U.S.C. §1983 for alleged violations of Plaintiff William Wilcox's Fourteenth Amendment Substantive Due Process Rights under the United States Constitution and state law claims.

FACTS[1]

On April 3, 2007 Plaintiff William Wilcox was riding in his SUV with his son when he was involved in a motor vehicle accident with Defendant Jeremiah Fenn. Plaintiff alleges that he was driving his 1997 Toyota 4runner and towing a U-Haul trailer east on I-16 at or near the Highway 129 exit. Defendants Fenn and Gilliam, police officers for Dougherty County, were operating their respective vehicles on I-16, traveling from Dougherty County to Savannah to participate in "Operation Rolling Thunder," a large scale program to deter speeding on the highways. Neither defendant was responding to an emergency and neither Officer

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[1] The facts set forth below are gleaned from Plaintiff's Complaint (Doc. 1), because in consideration of a motion to dismiss, the Court must accept all of Plaintiff's well pleaded allegations as true. *See infra* pp. 2-3.

activated the flashing lights or sirens of their respective vehicles; and neither vehicles' flashing lights or sirens were on at the time of the accident. Both defendants drove in excess of the speed limit–at approximately 90 mph or greater. Defendant Fenn's vehicle collided with Plaintiff's, causing Plaintiff to lose control of his vehicle. As a result of the collision, Plaintiff was injuried and his son, who was a passenger in the vehicle, was killed.

STANDARD OF REVIEW

Judgment on the pleadings is proper when no issues of material fact exist, and the moving party is entitled to judgment as a matter of law based on the substance of the pleadings and any judicially noted facts. Andrx Pharm., Inc. v. Elan Corp., PLC, 421 F.3d 1227, 1232-33 (11th Cir. 2005). The Court's analysis on a motion under Fed. R. Civ. P. 12(c) for judgment on the pleadings is similar to the analysis of a motion to dismiss for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6). *Compare* Andrx Pharm., Inc., 421 F.3d at 1232-33 *with* Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007). Both motions attack the sufficiency of a plaintiff's complaint, however, the motion under Rule 12(c) also requires consideration of any other pleadings filed in the case. *See* Fed. R. Civ. P. 12(b)(6) and 12(c). Despite inclusion of pleadings other than the complaint, under Rule 12(c), the Court must still accept the allegations of Plaintiff's Complaint as true. *See id*. Therefore, if upon reviewing the pleadings it is clear that the plaintiff would not be entitled to relief under any set of facts that could be proved consistent with the allegations, the court should dismiss the complaint. Horsley v. Rivera, 292 F.3d 695, 700 (11th

Cir. 2002). Although a well-pleaded Complaint may proceed even where the Court believes "that actual proof of [the] facts is improbable, and that a recovery is very remote and unlikely," a plaintiff must still allege facts that establish a "plausible" entitlement to relief. Bell Atlantic Corp., 127 S. Ct. at 1974.[2]

DISCUSSION

Plaintiffs' Complaint contains three counts: Count I alleges negligence against all Defendants pursuant to Georgia tort law; Count II alleges a Section 1983 claim against Defendants Fenn and Gilliam for violation of Plaintiffs' rights under the Fourteenth Amendment; and Count III alleges a Monell policy claim against Defendant Dougherty County.

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[2] Although the decision in Bell Atlantic Corp. addressed the standard of review in the motion to dismiss context, it is still applicable to the case at bar. As noted by the Court, the analysis under Rule 12(c) and Rule 12(b)(6) is very similar. Furthermore, Plaintiff's contention that the Bell Atlantic Corp. decision is only applicable in the context of antitrust cases is incorrect. Notwithstanding the fact that Bell Atlantic Corp. was an antitrust case, the Supreme Court discussed the pleading requirements necessary to survive a motion to dismiss generally. *See* Bell Atlantic Corp., 127 S. Ct. at 1968. In that vein, the Court specifically discussed the erroneous sitation by many lower Courts of its decision in Conley v. Gibson, 355 U.S. 41 (1957), wherein the Court stated that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." The Bell Atlantic Corp., noted, in a detailed discussion, that any standard of analysis for a motion to dismiss established upon the "no set of facts" language in isolation is incorrect. Bell Atlantic Corp., 127 S. Ct. at 1968. Accordingly, the Court went on to establish the now applicable "plausibility" standard.

Defendants, via their Motion for Judgment on the Pleadings, challenge Plaintiffs' Complaint in its entirety. Defendants challenge Plaintiffs' federal claims on four separate grounds. First, Defendants argue that Count II of Plaintiffs' Complaint must fail because the allegations therein do not establish a substantive due process violation; second, Defendants Fenn and Gilliam are entitled to qualified immunity; third, Defendants Fenn and Gilliam are entitled to official immunity; and finally, Defendants argue that Plaintiff's Monell policy claim (Count III) must fail where there is no baseline substantive due process violation.

A. Substantive Due Process

The Eleventh Circuit has held:

> In order to sustain a 1983 action, a plaintiff must make a prima facie showing that the act or omission of a person acting under color of state law deprived plaintiff of a right, privilege, or immunity secured by the Constitution or the laws of the United States. Section 1983 is not self-executing; the statute itself creates no substantive rights. Although the right to life is an interest of constitutional dimension, not every deprivation of life amounts to a constitutional violation and gives rise to a claim under section 1983. The Fourteenth Amendment protects against only those deprivations of life which are effected without due process of law. Cannon v. Taylor, 782 F.2d 947, 949 (1986) (citations omitted).

Furthermore, "the substantive component of the Due Process Clause is violated by executive action only when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.'" County of Sacramento v. Lewis, 523 U.S. 833, 847 (1998).

Defendants contend that under Lewis, 523 U.S. 833 (1998), the allegations set forth in Plaintiffs' Complaint do not establish a substantive due process claim.

Plaintiffs articulate two lines of defense against Defendants' challenges to their substantive due process claim. First, Plaintiffs contend that the language from the Lewis decision actually supports their position. Additionally, Checki v. Webb, 785 F.2d 534 (5th Cir. 1986), cited in a footnote by the Lewis Court, supports the proposition that "intentional misuse" of a police vehicle is actionable under Section 1983 via the Fourteenth Amendment. Plaintiffs' second line of defense involves argument by analogy to Scott v. Harris, 127 S. Ct. 1769 (2007), wherein the Supreme Court addressed claims of excessive force brought pursuant to the Fourth Amendment. In reference to the Scott case, Plaintiffs note that Justice Scalia, writing for the Court, "found a suspect leading a chase at speeds exceeding 85 mph to be shocking." (Doc. 15).

The Court notes initially that Plaintiffs' second line of defense is unpersuasive as the same is of no consequence here. The analogy to the excessive force context requires more of a logical leap than necessary to determine the issues presently before the Court. Furthermore, Plaintiffs' notation that the Scott Court found driving beyond 85 m.p.h. "shocking" is

misleading. The passage selectively quoted by Plaintiffs provides:

> The videotape tells quite a different story. There we see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.

Scott, 127 S. Ct. at 1775. It is clear from the passage quoted above that the Court was not addressing the standard of "shocking to the conscience," applicable in this case. More generally, the behavior found to be "shocking" by the Court was that of the criminal suspect being pursued by Deputy Scott and others. Therefore, the Scott Court's determination that the driving maneuvers executed by Harris were "shocking" is inapposite to this case.

Plaintiffs' more weighty arguments concerning the Lewis opinion must also fail. Plaintiffs argument, as the Court understands it, is as follows. First the Lewis

Court's pronouncement[3] is not applicable to the case at bar because the Court cited Checki, in a footnote, to support their proposition. Specifically, the Checki Court noted, "[w]here a citizen suffers physical injury due to a police officer's *negligent use* of his vehicle, no section 1983 claim is stated. It is a different story when a citizen suffers or is seriously threatened with physical injury due to a police officer's *intentional misuse* of his vehicle." (Emphasis in original). Plaintiffs believe the italicized phrases are the key to their survival on Defendants' Motion for Judgment on the Pleadings, and also the reasons they will ultimately prevail on the merits. As Plaintiffs see it, Defendants Fenn and Gilliam not only negligently used their official police vehicles, but they also "intentionally" misused the same. Therefore, they contend, Fenn and Gilliam's conduct is not the sort of conduct the Lewis Court held was not actionable under Fourteenth Amendment substantive due process.

Plaintiffs' arguments fail for three reasons. First, while decisions of the Fifth Circuit rendered on or before September 30, 1981, are binding precedent in the Eleventh Circuit, Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), those rendered afterward are not. Therefore, the Checki decision is not binding upon this Court and is only persuasive to the extent that it offers the Court some guidance in deciding the issues currently pending.

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[3] "that high speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liablity under the Fourteenth Amendment, redressible by an action under 1983."

Second, Plaintiffs' interpretation of the phrase "intentional misuse," and its application to this case, does not necessarily follow from the factual scenario before the Fifth Circuit in Checki. In that case, Appellant Checki alleged that he, as a passenger, and a companion traveled westbound down Interstate 10 in the companion's vehicle. At some point during the journey down I-10, Checki and his companion observed a nondescript Oldsmobile rapidly approaching the rear of their vehicle. At that time, neither Checki nor his companion were aware that the unmarked Oldsmobile was occupied by state troopers. The Oldsmobile quickly closed in on the gap between it and the vehicle Checki was traveling in. Thereafter, the Oldsmobile tailgated Checki's vehicle, at times traveling with its bumper within two to three feet of Checki's car.

To avoid the Oldsmobile following so closely Checki's companion took evasive action. In an attempt to put some distance between their car and the Oldsmobile, Checki's companion accelerated to speeds in excess of 100 mph. After chasing Checki and his companion for approximately 20 miles across I-10, the officers activated the Oldsmobile's red grill lights and siren. Ultimately, Checki and his companion were stopped at a roadblock some 31 miles away from the point where they had initially noticed the Oldsmobile approaching from behind. Checki alleged that he was handcuffed without probable cause and struck in the face with a revolver after he and his companion were removed from their vehicle. Additionally, Checki alleged that the same officer who struck him in the face also broke his companion's arm before being restrained by a fellow officer.

Faced with these facts and in regard to Checki's substantive due process claim, the Checki Court held:

> Where a citizen suffers physical injury due to a police officer's *negligent use* of his vehicle, no section 1983 claim is stated. It is a different story when a citizen suffers or is seriously threatened with physical injury due to a police officer's *intentional misuse* of his vehicle. Factual development in this case could lead to a jury question whether Webb and Allison's car-chasing actions were inspired by malice rather than merely careless or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience. The trier of fact will have to determine whether Webb and/or Allison crossed the constitutional line that would make their pursuit and harassment actionable under section 1983. 785 F.2d at 538 (emphasis in original; citation omitted).

Interestingly, the Fifth Circuit cited an Eleventh Circuit case, Cannon, 782 F.2d at 950, for the proposition that negligent use of a police vehicle will not establish a Section 1983 claim.[4] The Cannon opinion offers a good comparison to the Checki case and helps to illuminate the Court's decision below--not to mention that the Cannon decision is actually binding upon this Court.

In Cannon, Officer Taylor was responding to a disturbance call at a local pool hall in Columbus,

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[4] This language is also included in the Lewis footnote reference by Plaintiffs. Lewis, 523 U.S. at 854 n.13.

Georgia. He traveled at a speed of at least 46 mph on a road with a 30 mph speed limit. Contrary to the requirements of Georgia law, O.C.G.A. § 40-6-6[5], Officer Taylor was traveling without either his siren or flashing lights activated. En route to the pool hall, Officer Taylor struck Plaintiff Cannon's vehicle, as she was crossing an intersection, killing her.

In light of the above facts, the Cannon Court cited the following passage from the Supreme Court's decision in Parratt v. Taylor, 451 U.S. 527, 544 (1981), *overruled on other grounds by*, Daniels v. Williams, 474 U.S. 327, 331 (1986) ("Upon reflection, we agree and overrule Parratt to the extent that it states that mere lack of due care by a state official may "deprive" an individual of life, liberty, or property under the Fourteenth Amendment"):

> To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under "color of law" into a violation of the Fourteenth Amendment cognizable under § 1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation

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[5] permitting officers to exceed posted speed limits when responding to emergency calls but only if the officer uses the flashing lights and siren.

> under § 1983. Such reasoning would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. We do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society. (Citations and quotations omitted).

In light of this language from the Supreme Court, the Cannon Court went on to hold that "a person injured in an automobile accident caused by the negligent, or even grossly negligent, operation of a motor vehicle by a policeman acting in the line of duty has no Section 1983 cause of action for violation of a federal right."

The Eleventh Circuit's decision in Cannon makes clear that Plaintiffs cannot proceed with their claim under Section 1983 and the Fourteenth Amendment. Although Checki is not binding here, the Court notes that the "intentional misuse" referenced by that Court was clearly referencing action whereby the manner in which an officer is using their vehicle is directed at the party alleging harm. For example, the state troopers in the Oldsmobile, in Checki, clearly intended to use their vehicle to engage Checki in an improper manner. Contrarily, Officer Taylor, from Cannon, "intended" to exceed the speed limit and purposefully failed to activate his sirens and flashing lights. However, Officer Taylor clearly did not intend to crash into Plaintiff Cannon. Therefore, "intentional misuse" does not mean, as Plaintiffs suggests, any improper use that is also purposeful on the officer's part. If Plaintiffs' argument were to prevail, Officer Taylor's actions would have been susceptible to a substantive due process claim–which the Eleventh Circuit clearly

held was not the case.[6] The Fourteenth Amendment would therefore be demoted into a federal tort law. This result is certainly contrary to the Supreme Court's Fourteenth Amendment jurisprudence. *See, e.g.*, Paul v. Davis, 424 U.S. 693, 701 (1976) (noting the "'constitutional shoals' that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law," and specifically stating that "the procedural guarantees of the Due Process Clause cannot be the source for such law").

The Court notes here that there is no issue as to any material facts in this case. The Court's holding accepts Plaintiffs allegation that Officers Fenn and Gilliam intentionally violated the speed limit and drove with reckless disregard for the safety of others. Notwithstanding these facts, the Court finds that Plaintiff has failed to allege acts which are actionable under the substantive due process clause of the Fourteenth Amendment through Section 1983. Accordingly, Defendants' Motion for Judgment on the Pleadings (Doc. 10) is **GRANTED** as to Count II (Section 1983 claim against Defendants Fenn and Gilliam) of Plaintiff's Complaint.

B. Monell Policy Claim

Plaintiffs allege a Monell policy claim against Defendant Dougherty County (Count III). As Plaintiffs

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[6] To clarify the Court's position, the Court notes, under Plaintiffs' legal view, substantive due process claims, alleging a vehicle related injury, would only fail where the officer lost control of his/her vehicle and then caused an injury because, as Plaintiffs see it, any intent to act coupled with misuse is actionable under Section 1983.

acknowledge, their Monell policy claim is dependent upon survival of their Section 1983 claim against Defendants Fenn and Gilliam. *See* (Doc. 15, Part III.A.3.). Because the Court has herein granted Defendants' Motion for Judgment on the Pleadings as to Count II of Plaintiffs' Complaint, alleging a Section 1983 claim against Defendants Fenn and Gilliam, Count III of Plaintiffs' claim must also fail. *See* Dahl v. Holley, 312 F.3d 1228, 1236 (11th Cir. 2002). Accordingly, Defendants' Motion for Judgment on the Pleadings (Doc. 10) is **GRANTED** as it relates to Count III of Plaintiffs' Complaint.

C. Georgia Tort Claims

Since the Court has dismissed all of Plaintiffs' federal claims (Counts II & III), it is no longer appropriate for the Court to exercise pendent jurisdiction over Plaintiffs' state law claim for negligence against all Defendants (Counts I). *See* Roper v. Edwards, 815 F.2d 1474, 1477-78 (11th Cir. 1987). Accordingly, Plaintiffs' state law claim (Count I) is **DISMISSED WITHOUT PREJUDICE**. Dismissal is **without prejudice** because the Court has not reached a decision on the merits of Plaintiffs' state law claim.

CONCLUSION

For the reasons articulated above: Defendants' Motion for Judgment on the Pleadings (Doc. 10) is **GRANTED**; and Plaintiffs' Motion to Set Briefing Schedule (Doc. 6), Plaintiffs' Motion for Summary Judgment (Doc. 17), Plaintiffs' Motion for Partial Summary Judgment (Doc. 20), Plaintiffs' Motion for Issuance of Letters Rogatory (Doc. 26) are all

DENIED as MOOT, and Plaintiffs' state law claim (Count I) is **DISMISSED WITHOUT PREJUDICE.**

SO ORDERED, this 30 day of March, 2009.

/s/W. Louis Sands
THE HONORABLE W. LOUIS SANDS,
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA ALBANY DIVISION

CIVIL ACTION NUMBER
No. 1:08-CV-20(WLS)

[Filed March 30, 2009]

WILLIAM WILCOX, individually and, SHIRLEY WILCOX, his wife,	)
Plaintiff,	)
VS.	)
JEREMIAH FENN, et al.,	)
Defendants.	)

JUDGMENT

Pursuant to this Court's Order filed March 30, 2009, and for the reasons stated therein, the Defendants' Motion for Judgment on the Pleadings is GRANTED and Defendants are entitled to their costs of this action; Judgment is entered accordingly.

This 30th day of March, 2009.

GREGORY J. LEONARD, CLERK

BY:s/Brenda J. Littleton
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE MIDDLE DISTRICT OF GEORGIA ALBANY DIVISION

Civil Action File No.

[Filed February 5, 2008]

WILLIAM WILCOX, individually, and SHIRLEY WILCOX, his wife,	)
Plaintiffs,	)
v.	)
JEREMIAH FENN, individually, and in his official capacity as a Dougherty County police officer, OSCAR GILLIAM, individually and in his official capacity as a Dougherty County police officer, DOUGHERTY COUNTY, GEORGIA, a political subdivision of the State of Georgia,	)
Defendants.	)

COMPLAINT FOR DAMAGES AND DEMAND FOR JURY TRIAL

Plaintiffs, William Wilcox, (WILCOX) individually and Shirley Wilcox, his wife, sue the defendants

Jeremiah Fenn (FENN), individually and in his official capacity as a Dougherty County police officer, Oscar Gilliam (GILLIAM), individually and in his official capacity as a Dougherty County police officer, and DOUGHERTY COUNTY, GEORGIA, and allege:

PARTIES, JURISDICTION AND VENUE

1.

This is an action for personal injuries to William Wilcox, loss of consortium by Shirley Wilcox and for the violation William Wilcox's Civil Rights as authorized by 42 U.S.C.§1983.

2.

WILCOX is married to Shirley Wilcox, and they are both residents of Athens-Clarke County and sui juris.

3.

FENN is a resident of DOUGHERTY COUNTY and subject to the venue and jurisdiction of the court pursuant to 28 U.S.C.A. §§ 1331 and 1343.

4.

At all material times, FENN was an agent and employee of DOUGHERTY COUNTY and acting under color of law and within the course and scope of his employment as a sworn police officer of the DOUGHERTY COUNTY Police Department.

5.

At all time material, DOUGHERTY COUNTY owned the motor vehicle operated by FENN and marked as an official DOUGHERTY COUNTY Police Department police vehicle.

6.

GILLIAM is a resident of DOUGHERTY COUNTY and subject to the venue and jurisdiction of the court pursuant to 28 U.S.C.A. §§ 1331 and 1343.

7.

At all material times, GILLIAM was an agent and employee of DOUGHERTY COUNTY and acting under color of law and within the course and scope of his employment as a sworn police officer of the DOUGHERTY COUNTY Police Department.

8.

At all time material, DOUGHERTY COUNTY owned the motor vehicle operated by GILLIAM and marked as an official DOUGHERTY COUNTY Police Department police vehicle.

9.

DOUGHERTY COUNTY, GA is a political subdivision of the State of Georgia that has waived sovereign immunity to the extent required by O.C.G.A. § 33-24-51, and is subject to the jurisdiction and venue of this court pursuant to 42 U.S.C. § 1983 and 28 U.S.C.A. §§ 1331 and 1343.

10.

This court has jurisdiction of the claims for violation of 42 U.S.C. § 1983 pursuant to 28 U.S.C. § 1343, as it presents a federal question.

11.

This court has jurisdiction of the claims for personal injuries asserted under state law pursuant to the pendent jurisdiction of the court.

12.

The amount in controversy exceeds $75,000.

13.

Plaintiffs gave DOUGHERTY COUNTY notice of their claims pursuant to O.C.G.A. §36-11-1, and DOUGHERTY COUNTY failed to respond thereto.

14.

Plaintiffs have been required to retain the undersigned attorneys and have agreed to pay them a reasonable fee for their services in the prosecution of their claims set forth herein.

COUNT I

NEGLIGENCE AGAINST FENN, GILLIAM AND DOUGHERTY COUNTY

Plaintiffs reallege paragraphs 1 through 14.

15.

On April 3, 2007, WILCOX was driving his 1997 Toyota 4runner and towing a U-Haul trailer (hereinafter collectively referred to as "the vehicle") east on I-16 at or near the Highway 129 exit at or below the posted speed limit of 70 MPH.

16.

On April 3, 2007, FENN and GILLAM were on duty as police officers employed by DOUGHERTY COUNTY and were authorized and assigned to participate in "Operation Rolling Thunder," which was a joint law enforcement operation to be conducted in the Savannah, GA area, intended to establish a large police presence on the local roads in order to deter speeding and the traffic accidents and fatalities that had occurred as a result.

17.

On April 3, 2007, FENN and GILLIAM were operating their respective police vehicles on I-16 traveling from DOUGHERTY COUNTY to Savannah, GA to participate in "Operation Rolling Thunder."

18.

At all material times, FENN and GILLIAM were not responding to any emergency and did not have either their flashing lights or sirens on, and they had been driving on I-16 for an extended time before approaching the WILCOX vehicle from behind.

19.

FENN was following closely behind GILLIAM, who was driving a marked SUV, when GILLIAM suddenly changed lanes to pass the WILCOX vehicle and did so in a manner that made it likely that FENN would not be able to avoid colliding with the WILCOX vehicle.

20.

Upon information and belief, GILLIAM's speed when he passed WILCOX was at or in excess of 90 mph when the posted speed limit was 70 MPH.

21.

Upon information and belief, FENN and GILLIAM were drafting or otherwise driving in tandem so as to act in concert in creating a substantial risk of injury to other drivers on the road.

22.

The impact from behind by FENN's vehicle caused WILCOX to lose control of his vehicle, and it rolled several times, causing severe injury to WILCOX and the death of his son Milton Wilcox, who was a passenger in the vehicle.

23.

FENN was negligent in the operation of his vehicle by exceeding the posted speed limit and violating O.C.G.A. § 40-6-6, and failing to maintain control over his vehicle so as to prevent it from colliding with the rear of the vehicle being driven by WILCOX.

24.

GILLIAM was negligent in exceeding the speed limit and acting in concert with FENN by driving in tandem or in such a manner as to make it likely that FENN would be unable to avoid hitting WILCOX's vehicle when GILLIAM changed lanes.

25.

As a proximate result of FENN and GILLIAM's negligence, WILCOX sustained a spinal cord injury, medical expenses in excess of $200,000.00, disability, lost wages and earning capacity, and great pain and suffering, all of which are either permanent or continuing.

26.

As a proximate result of FENN and GILLIAM's negligence, Shirley Wilcox sustained the loss of consortium of her husband William Wilcox.

27.

DOUGHERTY COUNTY is vicariously liable for all acts of negligence by FENN and GILLIAM.

WHEREFORE, plaintiffs demand judgment against defendants for compensatory damages in an amount within the jurisdiction of the court and as determined by the jury plus costs.

COUNT II

CIVIL RIGHTS VIOLATION AGAINST FENN AND GILLIAM IN THEIR INDIVIDUAL CAPACITY AS A DOUGHERTY COUNTY POLICE OFFICER

Plaintiff realleges paragraphs 1 through 27.

28.

WILCOX had a clearly established, federally protected interest in life, liberty and property and a substantive due process right protected by the 14th Amendment to the U.S. Constitution to be free from the unreasonable and arbitrary and capricious exercises of power by executive government officers, and a right to be free from the exercise of power by government actors without any plausible justification in the service of a legitimate governmental objective including such conduct that was deliberately indifferent to WILCOX's constitutionally protected interests and which "shocks-the-conscience" of federal judges.

29.

FENN and GILLIAM, acting under color of law and in violation of 42 U.S.C. §1983, deprived WILCOX of his interest in life, liberty and property by violating WILCOX's right to personal security and substantive due process as alleged below, which caused WILCOX to suffer severe personal injury.

30.

FENN and GILLIAM had an extended period of time to consider and reflect upon their extraordinary high speed race across the state along I-16 while traveling from Albany to Savannah to participate in Operation Rolling Thunder.

31.

FENN and GILLIAM knew their high speed race to Savannah with GILLIAM, which they engaged in after actual deliberation, created an extraordinarily high risk of severe injury and death to other persons on I-16 because the very purpose of the trip to Savannah was to deter speeding which had caused a dramatic increase in traffic fatalities.

32.

FENN and GILLIAM knew that even while on duty as a police officer, they are prohibited from exceeding the speed limit without there being a real emergency and even if there were a real emergency they were required to use their flashing lights and siren, and after actual deliberation they chose to violate the law while acting in the line of duty and under color of law.

33.

At no time material to this action did FENN or GILLIAM use their flashing lights or siren.

34.

In spite of their knowledge of the substantial risk of injury and death, FENN and

GILLIAM deliberately and consciously and/or with reckless disregard for and/or deliberate indifference to the life, liberty, property and personal security of other motorists exposed to the consequences of their abuse of their official position and government power, and thereby killed Milton Wilcox and severely injured WILCOX.

35.

FENN and GILLIAM's conduct of willfully violating police procedures, and state law, and recklessly and deliberately exceeding the posted speed limit:

A. did not involve making or carrying out any decision to use force to restore order;

B. did not require them to balance any governmental interests in the use of force or exposing innocent bystanders to substantial risk of injury or death;

C. was not made in haste, under pressure or without the luxury of reflection or a second chance to determine its appropriateness;

D. was wholly lacking in any good faith in the discharge of their duties as a police officers;

E. did not require an exercise of any judgment balancing competing obligations as a police officer;

F. did not require them to make any decisions about their conduct in haste, under pressure, or without the luxury of a second chance;

G. was, with actual deliberation in the execution of their office as a police officer, an intentional misuse of their vehicles to violate the law and expose the public in general, and WILCOX in particular, to the substantial risk of severe injury and death.

36.

FENN and GILLIAM had no legitimate governmental objective in their extraordinary high speed race across the state along I-16 while traveling from Albany to Savannah to participate in Operation Rolling Thunder.

37.

FENN and GILLIAM's deliberate indifference and reckless disregard of the substantial risk of severe injury and death to other motorists was an arbitrary use of deadly power and force which shocks the conscience and deprived WILCOX of his right to substantive due process protected by the Fourteenth Amendment to the U.S. Constitution and in violation of 42 U.S.C. § 1983.

38.

FENN and GILLIAM's conduct which caused WILCOX's severe injury was an abuse of official power that is arbitrary in a constitutional sense.

39.

As a proximate result of FENN and GILLIAM's violation of WILCOX's substantive due process rights, WILCOX sustained a spinal cord injury, medical expenses in excess of $200,000.00, disability, lost wages and earning capacity, and great pain and suffering, all of which are either permanent or continuing.

40.

As a proximate result of FENN and GILLIAM's violation of WILCOX's substantive due process rights, Shirley Wilcox sustained the loss of consortium of her husband William Wilcox.

41.

WILCOX is entitled to attorney's fees pursuant to 42 U.S.C. § 1988(b).

42.

FENN and GILLIAM's actions were so callous and in deliberate or reckless disregard of WILCOX's constitutional rights as to justify an award of punitive damages.

WHEREFORE, Plaintiffs demand compensatory and punitive damages against FENN and GILLIAM in an amount determined by a jury, plus costs and attorney's fees.

COUNT III

VIOLATION OF WILCOX CIVIL RIGHTS AGAINST DOUGHERTY COUNTY FOR FAILURE TO TRAIN

Plaintiff realleges paragraphs 1 through 42.

43.

DOUGHERTY COUNTY knew to a moral certainty that its police officers would be required to drive motor vehicles in the performance of their duties because DOUGHERTY COUNTY provided motor vehicles to its officers in part to allow them to accomplish their assigned duties.

44.

DOUGHERTY COUNTY knew that its police officers would be called on during their duties to drive motor vehicles in circumstances that might require them to disobey traffic laws that private citizens were required to obey.

45.

DOUGHERTY COUNTY Police Department had a SOP that directed officers to comply with traffic laws when operating DOUGHERTY COUNTY vehicles.

46.

DOUGHERTY COUNTY knew that despite its SOP its police officers needed to be trained in the proper and constitutional limitations in the use of motor vehicles while on duty as police officers for DOUGHERTY COUNTY.

47.

DOUGHERTY COUNTY knew on and before April 3, 2007, that its police officers routinely disregarded its SOP and violated the traffic laws regarding speeding and otherwise, and that such violations created substantial risks to citizens and motorists of severe injury and death.

48.

Upon information and belief, Albany 911 operators provided complaints to DOUGHERTY COUNTY of its officers' traffic violations and especially speeding violations.

49.

Upon information and belief, DOUGHERTY COUNTY was aware through other means that its police officers commonly disobeyed traffic laws and especially speed limits while on duty without legal authorization, and thus intentionally misused DOUGHERTY COUNTY motor vehicles and did so with the unofficial immunity that merely being a police officer provided.

50.

DOUGHERTY COUNTY wholly failed to train or supervise its officers in the proper use of police vehicles within the applicable traffic laws, and even in the face of specific complaints by the public about officers disobeying traffic laws, took no steps whatever to train or supervise its officers in the proper operation of DOUGHERTY COUNTY vehicles in compliance with applicable laws and so as not to violate the constitutional rights of citizens and motorists.

51.

Knowing the substantial risks of severe injury and death created by its police officers operating its vehicles without proper training or supervision, DOUGHERTY COUNTY nevertheless provided no training in the proper operation of DOUGHERTY COUNTY vehicles when the need for more or different training was so obvious and the inadequacy of training so likely to result in a violation of the constitutional rights of motorists, DOUGHERTY COUNTY thereby created a policy, custom or practice reflecting deliberate indifference to the substantive due process rights of the motoring public that came into contact with DOUGHERTY COUNTY police officers operating DOUGHERTY COUNTY vehicles.

52.

As a proximate result of DOUGHERTY COUNTY's policy of deliberate indifference and failure to train its police officers in the proper use of its vehicles, FENN and GILLIAM engaged in their race across the state on I-16 which deprived WILCOX of his right to

substantive due process, and caused severe injury to WILCOX and the damages alleged in paragraph 40 above.

WHEREFORE, Plaintiffs demand judgment against DOUGHERTY COUNTY for compensatory and punitive damages plus costs and attorney fees.

Plaintiffs demand trial by jury.

GARY GERRARD, P.A.

107 Platt Street
P.O. Box 542
Lexington, Georgia 30648

BY: S/ Gary Gerrard
GARY GERRARD
Georgia Bar Number 291712

150 East Washington Street
Athens, GA 30601

BY: S/ Regina M. Quick
REGINA M. QUICK
Georgia Bar Number 590855

APPENDIX E

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE MIDDLE DISTRICT OF GEORGIA ALBANY DIVISION

Civil Action No. 1:08-cv-00020-WLS

[Filed February 28, 2008]

WILLIAM WILCOX, individually, and SHIRLEY WILCOX, his wife,	)
Plaintiffs,	)
vs.	)
JEREMIAH FENN, individually, and in his official capacity as a Dougherty County, Georgia police officer, OSCAR GILLIAM, individually and in his official capacity as a Dougherty County, Georgia police officer, DOUGHERTY COUNTY, GEORGIA, GEORGIA, a political subdivision of the State of Georgia,	)
Defendants.	)

DEFENDANTS' ANSWER AND DEFENSES

COMES NOW Dougherty County, Georgia, Jeremiah Fenn, in his official capacity and individual

capacity, and Oscar Gilliam, in his official capacity and individual capacity, named Defendants in the above styled civil action, by and through their attorney, Larry G. Cobb, and provide their Answer and Defenses as follows:

FIRST DEFENSE

The law does not provide for awards of punitive damages against County, Georgia governments; therefore, the Plaintiffs' punitive damages claim against Dougherty County, Georgia, Jeremiah Fenn and Oscar Gilliam in their official capacities should be dismissed.

SECOND DEFENSE

The Plaintiffs have failed to state a claim upon which relief can be granted under 42 USC §1983 alleged in Paragraph 1 of the complaint and these claims should therefore be dismissed.

THIRD DEFENSE

There is no basis for liability against Jeremiah Fenn or Oscar Gilliam in their "official capacities" as such an action is in reality a suit against the entity itself as a matter of law. As a result, the Plaintiffs' action against these Defendants in their official capacities should be dismissed.

FOURTH DEFENSE

The Plaintiffs 42 USC §1983 claims against Defendants Jeremiah Fenn and Oscar Gilliam in their individual capacities are barred by the doctrine of

qualified immunity and the claims should therefore be dismissed.

FIFTH DEFENSE

As qualified immunity is a matter of jurisdiction, this Court lacks jurisdiction of the present action against Defendants Jeremiah Fenn and Oscar Gilliam in their individual capacities and these claims should therefore be dismissed.

SIXTH DEFENSE

The Defendants are not liable to the Plaintiffs under 42 USC §1983 because the conduct of the Defendants was not in violation of any clearly established constitutional right of which a reasonable objective officer would have known and was likewise objectively reasonable.

SEVENTH DEFENSE

No action or inaction on the part of the Defendants was the proximate cause of any injury sustained by plaintiffs and the complaint should therefore be dismissed.

EIGHTH DEFENSE

Neither Dougherty County, Georgia Jeremiah Fenn nor Oscar Gilliam, in their official capacities, is liable to the Plaintiff under any theory of recovery because Plaintiffs' damages, if any, were not proximately caused by any official policy, practice, custom or directive of Dougherty County, Georgia, Jeremiah Fenn or Oscar Gilliam, in their official capacities.

NINTH DEFENSE

As no constitutional rights of the Plaintiffs have been violated by the Defendants, this Court is without subject matter jurisdiction with respect to any claims asserted by the Plaintiffs under the laws of the State of Georgia and the Plaintiffs' state law claims should therefore be dismissed.

TENTH DEFENSE

Defendant Dougherty County, Georgia and all defendants sued in their official capacities enjoy sovereign immunity with respect to the Plaintiffs' state law claims except as statutorily established under O.C.G.A 36-92-2 and, therefore, the state law claims against these defendants should be dismissed or limited thereto.

ELEVENTH DEFENSE

Defendants Jeremiah Fenn and Oscar Gilliam, in their individual capacities, enjoy official immunity from suit with respect to the Plaintiffs' state law claims and, therefore, the state law claims against these defendants should be dismissed.

TWELFTH DEFENSE

As damages are not recoverable on the basis of respondeat superior under 42 USC §1983, to the extent that the Plaintiffs seek to impose vicarious liability upon some or all Defendants, the Plaintiffs' claims should be dismissed.

THIRTEENTH DEFENSE

Responding to the individually numbered paragraphs of the Plaintiffs' Complaint, the Defendants show the court as follows:

1.

The Defendants acknowledge that Plaintiffs have filed a lawsuit on the grounds stated in paragraph 1 of the complaint. However, the Defendants deny that they are liable to the Plaintiff under any circumstances.

2.

After reasonable investigation, the Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 2 of the complaint and they are therefore denied.

3.

Admitted in part and denied in part. It is admitted that Jeremiah Fenn is a resident of Dougherty County. The remaining averments in paragraph 3 are denied.

4. – 5.

The Defendants admit the allegations in paragraphs 4-5 of the complaint.

6.

The Defendants deny the allegations in paragraph 6 of the complaint.

7. – 8.

The Defendants admit the allegations in paragraphs 7-8 of the complaint.

9.

Admitted in part and denied in part. It is admitted that Dougherty County is a political subdivision of the State of Georgia that has waived sovereign immunity to the extent required by O.C.G.A § 33-24-51. The remaining averments in paragraph 9 are denied.

10. – 11.

The Defendants deny the allegations in paragraphs 10-11 of the complaint.

12.

The Defendants admit the allegations in paragraphs 12 of the complaint.

13.

Admitted in part and denied in part. It is admitted that Plaintiffs gave Dougherty County notice of their claims pursuant to O.C.G.A. § 36-11-1. The remaining averments in paragraph 13 are denied.

14.

The Defendants admit the allegations in paragraph 14 of the complaint.

COUNT 1

The Defendants incorporate into this section of their answer all of the responses and defenses previously set out in this answer as if fully set out in this section.

15. – 18.

The Defendants admit the allegations in paragraphs 15-18 of the complaint.

19.

The Defendants deny the allegations in paragraph 20 of the complaint.

20.

The Defendants deny the allegations in paragraph 20 of the complaint.

21.

The Defendants deny the allegations in paragraph 21 of the complaint.

22.

The Defendants admit the allegations in paragraph 22 of the complaint.

23. – 24.

The Defendants deny the allegations in paragraphs 23-24 of the complaint.

25. – 27.

The Defendants deny the allegations in paragraphs 25-27 of the complaint.

Wherefore, Defendants deny the allegations contained in the "Wherefore" clause of Plaintiffs' Complaint and deny that Plaintiffs are entitled to any relief requested therein.

COUNT II

The Defendants incorporate into this section of their answer all of the responses and defenses previously set out in this answer as if fully set out in this section.

28.

The Defendants deny the allegations in paragraph 28 of the complaint.

29. – 32.

The Defendants deny the allegations in paragraphs 29-33 of the complaint.

33.

The Defendants admit the allegations in paragraph 33 of the complaint.

34.

The Defendants deny the allegations in paragraph 34 of the complaint.

35.

The Defendants deny the allegations in paragraph 35 of the complaint.

36.

The Defendants deny the allegations in paragraph 36 of the complaint.

37.

The Defendants deny the allegations in paragraph 37 of the complaint.

38.

The Defendants admit the allegations in paragraph 38 of the complaint.

39.

The Defendants deny the allegations in paragraph 39 of the complaint.

40.

The Defendants deny the allegations in paragraph 40 of the complaint.

41.

The Defendants deny the allegations in paragraph 41 of the complaint.

42.

The Defendants deny the allegations in paragraph 42 of the complaint.

Wherefore, Defendants deny the allegations contained in the "Wherefore" clause of Plaintiffs' Complaint and deny that Plaintiffs are entitled to any relief requested therein.

COUNT III

The Defendants incorporate into this section of their answer all of the responses and defenses previously set out in this answer as if fully set out in this section.

43. – 46.

The Defendants admit the allegations in paragraphs 43-46 of the complaint.

47. – 52.

The Defendants deny the allegations in paragraphs 47-52 of the complaint.

53.

All allegations of the complaint not expressly admitted herein are hereby denied.

54.

Defendants deny the allegations contained in the "Wherefore" clause of Plaintiffs' Complaint and deny

that Plaintiffs are entitled to any relief requested therein.

WHEREFORE, having fully responded to the Plaintiff's Complaint, the Defendants pray that the Court dismiss the present action with all costs to be assessed against the Plaintiffs.

THE DEFENDANTS HEREBY DEMAND A JURY TRIAL.

This 26th day of February, 2008.

Respectfully Submitted,

SHIVERS & ASSOCIATES

By: /s/ Larry G. Cobb
Larry G. Cobb
Attorney for Defendants,
Dougherty County, Georgia, Jeremiah Fenn and Oscar Gilliam
State Bar No.: 171423

Caller Service No. 1808
Alpharetta, GA 30023-1808
Telephone: (770) 521-3750
Facsimile: (770) 521-3760

* * *

[*Certificate of Service Omitted In Printing of this Appendix*]

APPENDIX F

WITNESSES

09-SR-391
WARRANT NO. 09-5138MW
Misdemeanor

CRIMINAL WARRANT

THE STATE

V.

Jerimiah Fenn
2106 Habersham Road
Albany, GA 31701

AGE: ___ DOB:

Order that bond be set at:
Bond: **$0.00**
Judge:_____

CHARGED WITH:
Homicide By Vehicle (Second Degree)
Violation of Ga. Code O.C.G.A. § 40-6-393B

PROSECUTOR:

Cpl R.P. Ballkcom
Ga. State Patrol Post 45
Statesboro, Ga

The above named defendant arrested this
___ day of ___, 20__.
At ___ o'clock __ m.

_____
Arresting Officer

[SEAL]
Georgia, Candler County
This is to certify that this is a true and correct copy of the original as of record in this office.

This the 31st day of March, 2009
/s/
Clerk Superior Court, Candler County Ga.

Filed
CLERK OF COURTS CANDLER CO., GA

MAR 16 2009
/s/

09-SR-391
WARRANT NO. 09-5138MW

GEORGIA, CANDLER COUNTY AFFIDAVIT

Personally came Cpl R.P. Ballkcom, who on oath says that, to the best of affiant's knowledge and belief that Jerimiah Fenn did, in the County aforesaid, commit the offense of, TO WIT 40-6-393B Homicide By Vehicle (Second Degree) on 04/03/2007. In CANDLER County, Georgia: the place of occurrence of said offense being I-16 mear Mile marker 105. Candler Co.; and against the laws of the State of Georgia.

Said offense being described as:

> 40-6-393B Homicide By Vehicle (Second Degree). For the said Jerimiah Fenn did violate O.C.G.A. 40-6-393B when he/she willingly and knowingly did commit the offense of Homicide By Vehicle (Second Degree) when he struck the rear end of vehicle and causing it to overture resulting in death.

and thus deponent makes this affidavit that a warrant may issue for his/her arrest.

Sworn to and subscribed before me, this 09th day of March, 2009 at __ m.

/s/Robert P. Ballkcom
Affiant

/s/_____
Magistrate

GEORGIA, CANDLER COUNTY **WARRANT**

To any sheriff, deputy sheriff, coroner, constable, marshall or other law enforcement officer of Georgia-Greetings.

For sufficient causes made known to me in the above affidavit and from other oral testimony given under oath, you are hereby commanded to arrest Jerimiah Fenn, the Defendant named in the foregoing affidavit charged by the prosecutor therein with the offense against the laws of this State as enunciated in this affidavit and bring him/her before me or some other Judicial Officer of this State to be dealt with as the law directs. Herein fail not.

This March 09, 2009, at _____m.

/s/_____
Magistrate

GEORGIA, CANDLER COUNTY ORDER

After hearing the evidence in the above case, it is ordered that said defendant be bound in a bond of _____ Dollars Cash or _____ Dollars Property for his/her appearance on the first day at the next term or session next after this day of the ____ Court of Candler County to be held in and for said county to answer the charge of Homicide By Vehicle (Second Degree). In default thereof that he/she be committed to the common jail of said County, there to be safely kept until thence delivered by due course of law.

Given under my hand and seal this _____

_____
Magistrate

Filed
CLERK OF COURTS CANDLER CO., GA

MAR 16 2009
/s/

APPENDIX G

Constitutional Provisions and Statutes Involved

U.S. Constitution, Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983. Civil action for deprivation of rights:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a

declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

No. 10-262

Supreme Court, U.S.
FILED
NOV 30 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

WILLIAM WILCOX and
SHIRLEY WILCOX, his wife,

Petitioners,

vs.

JEREMIAH FENN, OSCAR GILLIAM, and
DOUGHERTY COUNTY, GEORGIA,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THEODORE FREEMAN, ESQ.
Counsel of Record
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QUESTION PRESENTED

Whether the substantive component of the Due Process Clause of the Fourteenth Amendment is implicated when a police officer's alleged speeding on a highway, without more, causes a motor vehicle accident with a member of the general public under circumstances not involving an emergency, a response to a call for service, or a pursuit.

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OPINIONS AND JUDGMENT BELOW

The appendix to the petition includes the March 30, 2009 order of the United States District Court for the Middle District of Georgia granting respondents' motion for judgment on the pleadings. (Pet. App. at 6-20.) The district court entered judgment for respondents on the same day. (Pet. App. at 21-22.) The appendix to the petition also includes the May 25, 2010 decision and opinion of the United States Court of Appeals for the Eleventh Circuit affirming, per curiam, the district court's judgment. (Pet. App. at 1-5.) The Eleventh Circuit's opinion is not reported, but it may be found in the *Federal Appendix* at 380 F. App'x 837 and on Westlaw at 2010 WL 2073182.

STATEMENT OF JURISDICTION

Respondents agree that the Court has jurisdiction to consider the petition pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents agree that this case involves a claim brought under 42 U.S.C. § 1983 based on an alleged violation of the substantive component of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Fourteenth Amendment provides, in pertinent part, as follows:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

42 U.S.C. § 1983 provides, in pertinent part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Bearing in mind that all plausible factual allegations in the complaint must be accepted as true in the context of a motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure, respondents agree with petitioners' statement of the case.

ARGUMENT

Rule 10 of the Rules of the Supreme Court of the United States provides that "[a] petition for a writ of

certiorari will be granted only for compelling reasons." SUP. CT. R. 10. Petitioners seek review of this case for three reasons: First, they contend that the Eleventh Circuit's decision conflicts with this Court's decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), and should be summarily reversed. SUP. CT. R. 10(c) (providing that the Court may review a case when "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court"). Second, they contend that there is a split among the circuits on the question presented and that this Court should resolve the split. SUP. CT. R. 10(a) (providing that the Court may review a case when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter"). Third, they contend that this case "presents a clean vehicle with which to resolve these conflicts." (Pet. at 6.)

Contrary to petitioners' arguments, the Eleventh Circuit's decision does not conflict with *Lewis* and should not be summarily reversed. Moreover, there is no conflict among the circuits regarding the applicability of the Due Process Clause under the circumstances presented by this case. Petitioners have attempted to manufacture a conflict, but a close examination of the authority cited in support of the supposed conflict shows that there is no actual conflict. Finally, whether a case is a "clean vehicle" is not a reason recognized by Rule 10 for granting a petition for a writ of certiorari, and so respondents will not

further address this reason. Thus, there is no compelling reason for the Court to grant the petition.

A. THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH *LEWIS* AND SHOULD NOT BE SUMMARILY REVERSED

In *Lewis*, the Court held that "high-speed chases with no intent to cause harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983." 523 U.S. at 854. In so holding, the Court explained that a deliberate indifference standard, which is applicable in some other § 1983 contexts, does not apply in cases involving a high-speed chase because actual deliberation is not practical. *Id.* at 848-53. From this, petitioners extrapolate that *Lewis* therefore holds that the deliberate indifference standard is to be applied whenever there *is* time for actual deliberation, even if the "deliberation" involves nothing more than the police officer's decision to exceed the speed limit while driving in a non-emergency, non-pursuit situation. This is not the holding of *Lewis*.

Because *Lewis* does not articulate a culpability standard which is applicable to the facts of this case, the Eleventh Circuit could not have applied the wrong standard based on *Lewis*. Petitioners are fixated on when *Lewis*'s standard of intent to injure applies compared to when the lower standard of deliberate indifference applies. But in focusing on that issue, petitioners are avoiding the real issue in this case, which is whether respondents' conduct even

implicates the Fourteenth Amendment in the first place. To determine this, it is necessary to examine the purpose of the Fourteenth Amendment.

The history of the Due Process Clause shows that its purpose was "to prevent government from abusing its power, or employing it as an instrument of oppression." *Collins v. City of Harker Heights*, 503 U.S. 115, 126 (1992) (punctuation and internal quotation marks omitted). Indeed, "[o]ur Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels v. Williams*, 474 U.S. 327, 332 (1986). Thus, the Court has categorically rejected negligence as a basis for finding that a public official has deprived someone of his rights under the Fourteenth Amendment. *Id.* at 330-31; *Davidson v. Cannon*, 474 U.S. 344, 348 (1986) ("The guarantee of due process has never been understood to mean that the State must guarantee due care on the part of its officials."). Otherwise, the Due Process Clause would be implicated whenever a public official commits a tort, and the Fourteenth Amendment would be nothing more than "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976).

Such an expansive view of the Due Process Clause would trivialize its lofty status as a constitutional provision. The interests that it protects must

be greater in significance than those protected by the tort law of the various states. While the Court has consistently recognized this, *Collins*, 503 U.S. at 128 (noting that the Court has "previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law"), petitioners would have the Court diminish the importance of the Due Process Clause by having it implicated in what is nothing more than a garden-variety motor vehicle accident, albeit one involving a police car. Respondents acknowledge that a public official could violate the Due Process Clause if he intends to injure someone with his vehicle, as *Lewis* contemplates, or, perhaps, if he intentionally misuses his vehicle as an instrument of oppression toward someone, as the Fifth Circuit contemplated in *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986) (cited in *Lewis*). However, petitioners do not allege that respondents intended to injure them, and as the district court held, respondents' conduct was in no sense directed at petitioners. (Pet. App. at 17.)

Respondents submit that motor vehicle accidents such as this should be governed by state tort law, not the Constitution of the United States. Indeed, the Court has rejected previous attempts to transform every accident involving a public official into a constitutional tort implicating the Due Process Clause. In *Parratt v. Taylor*, the Court noted that "under this rationale any party who is involved in nothing more than an automobile accident with a state official

could allege a constitutional violation under § 1983." 451 U.S. 527, 544 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986). And in *Paul*, the Court noted that "it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under 1983." 424 U.S. at 698. The clear import of these decisions is that motor vehicle accidents that happen to involve public officials do not trigger the protections of the Due Process Clause in the absence of some purposeful, conscience-shocking conduct by the public official which is directed at the person injured.[1]

Stated another way, there is no reason why a simple tort such as negligently causing a motor vehicle accident should assume constitutional proportions simply because the driver was a public official. *Id.* (noting that "if the same allegations had been made about respondent by a private individual, he would have nothing more than a claim for defamation under state law"). Other analogies illustrate the point. For example, "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Similarly, "false imprisonment does not

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[1] The Seventh Circuit has described a claim based on a motor vehicle accident as "a paradigm of the absurdity which could result from an overly broad interpretation of § 1983." *Hill v. Shobe*, 93 F.3d 418, 421 (7th Cir. 1996).

become a violation of the Fourteenth Amendment merely because the defendant is a state official." *Baker v. McCollan*, 443 U.S. 137, 146 (1979). As in *Estelle* and *Baker*, respondents' conduct may have been negligent, or even grossly negligent, but whether it was or was not is irrelevant to the constitutional analysis. In the end, petitioners must look to Georgia tort law for their remedy.

Even if respondents' conduct were characterized as reckless, the conclusion would be the same.[2] Reckless conduct is not purposeful conduct. "Historically, th[e] guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Daniels*, 474 U.S. at 331. Thus, the Due Process Clause is implicated only when allegedly unconstitutional conduct is directed at the person harmed. It is not enough for the public official to be aware of a generic danger faced by the public at large; rather, the public official must know that the specific person injured faces a particularized danger. *Martinez v. California*, 444 U.S. 277, 285 (1980) ("Further, the parole board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger."). Petitioners' allegations of recklessness do not suffice to establish constitutional liability in the context of

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[2] Petitioners allege that respondents were reckless in that they exceeded the posted speed limit by at least twenty miles per hour and that they were aware of the risk of injury to other motorists on the road. (Pet. App. at 28.)

this case because there is no corresponding allegation that respondents' reckless conduct was somehow directed at petitioners.

Decisions by the Fifth, Seventh, and Eleventh Circuits support the view that motor vehicle accidents not involving some purposeful conduct directed at the person injured do not implicate the Due Process Clause. In *Rooney v. Watson*, 101 F.3d 1378 (11th Cir. 1996), a police officer collided with another vehicle while traveling through an intersection at 73 miles per hour. The officer was not pursuing a suspect or responding to an emergency call, and he had not activated the lights or siren on his vehicle. The Eleventh Circuit acknowledged that the officer may have been negligent or even grossly negligent, but it held that there was no constitutional violation "simply because [the officer] was speeding in the absence of an emergency response or police pursuit." *Id.* at 1381.

Similarly, in a case where a police officer killed a person when he ran a red light while speeding and not using his vehicle's headlights, emergency lights, or siren, the Seventh Circuit held that "motor vehicle accidents caused by public officials or employees do not rise to the threshold of a constitutional violation actionable under § 1983, absent a showing that the official knew an accident was imminent but consciously and culpably refused to prevent it." *Hill v. Shobe*, 93 F.3d 418, 421 (7th Cir. 1996). The Seventh Circuit also held that "[i]t is insufficient to show that a public official acted in the face of a recognizable but

generic risk to the public at large." *Id.* at 421-22. Relying in part on the Seventh Circuit's opinion in *Hill*, the Fifth Circuit held that the Due Process Clause was not implicated in a case where a police officer struck and killed a pedestrian while speeding through an intersection in response to a non-emergency call. *Daniels v. City of Dallas*, 272 F. App'x 321, 322-23 (5th Cir. 2008) (per curiam).

To bring the analysis full-circle, respondents note that the Court did not alter the core principles of its substantive due process jurisprudence in *Lewis*. Indeed, the Court reaffirmed the notion that the Fourteenth Amendment is not a font of tort law and that not every common-law tort duty was constitutionalized in the Due Process Clause. *Lewis*, 523 U.S. at 848-49. The threshold question under the Due Process Clause is "whether the behavior of the governmental officer is so egregious, so outrageous, that it may be said to shock the contemporary conscience." *Id.* at 847 n.8. Respondents' alleged behavior in this case – speeding along on a highway – is not so egregious or outrageous as to shock the conscience. Respondents may have been negligent, grossly negligent, or even reckless, but this Court's own precedent, as well as precedent from several courts of appeal, indicate that such conduct in the context of what is otherwise a routine motor vehicle accident does not implicate the Due Process Clause. Simply put, more is required to convert a motor vehicle accident that just happens to involve a public official into a matter of constitutional dimensions.

By no means do respondents intend to minimize the consequences of the accident, nor do they suggest that the Court should condone speeding by police officers in non-emergency, non-pursuit situations. The circumstances of this case are unquestionably tragic, but the gravity of a person's injuries should not be the sole determinant of whether a case implicates the Constitution. Instead, it is the nature of the public official's conduct which determines whether the Constitution is implicated, and in this case, respondents' conduct falls far short of the threshold required to implicate the Due Process Clause. As the Court observed in *Daniels*, "[i]t is no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns." 474 U S. at 333.[3]

B. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE QUESTION PRESENTED BY THE PETITION

Petitioners also argue that the Court should grant their petition to resolve a conflict among the circuits as to which standard – intent to injure or deliberate indifference – applies to cases involving motor vehicle accidents that occur in non-emergency, non-pursuit situations. Respondents acknowledge

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[3] In fact, petitioners have an adequate remedy under Georgia tort law, which they are currently pursuing in the Superior Court of Dougherty County, Georgia.

that a circuit split is a compelling reason for the Court to grant a petition for a writ of certiorari, *Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law."), but petitioners have not shown that a circuit split exists on the question presented by this petition. In light of petitioners' failure to demonstrate that there is a disagreement among the circuits on this question, the Court should deny the petition.

Petitioners have contrived a supposed conflict between the Eleventh Circuit and some of the other circuits, but there is no actual conflict in the context of cases such as this involving simple motor vehicle accidents arising out of non-emergency, non-pursuit situations. Petitioners cite to a number of cases in which the courts generally discuss the culpability standard to be applied in substantive due process cases. In those cases, the courts have held that the higher standard of intent to injure applies only when there is no time for deliberation and split-second, highly pressurized decisions must be made, and that a lower standard of deliberate indifference applies when there is time for deliberation and split-second, highly pressurized decisions are not necessary. According to petitioners, the Eleventh Circuit applied the higher standard of intent to injure in this case, even though respondents had ample time to deliberate

about how to drive and were not required to make a split-second, highly pressurized decision.

There are two problems with petitioners' argument: First, all of the cases cited by petitioners are factually dissimilar to this case. Those cases involve police pursuits, conduct of off-duty police officers, student suicides, emergency calls, public employment, and withholding of exculpatory evidence. None involved a motor vehicle accident allegedly caused by the tortious conduct of an on-duty police officer in a non-emergency, non-pursuit situation. Second, the Eleventh Circuit did not specifically hold in this case that the higher standard of intent to injure governed petitioners' substantive due process claim. Instead, it held that petitioners could not maintain their substantive due process claim because respondents' conduct "was not so 'egregious' as to be 'arbitrary in the constitutional sense.'" (Pet. App. at 4.)

The Eleventh Circuit's holding in this case, like the holdings of the Fifth and Seventh Circuits in *Daniels* and *Hill*, and like its own prior holding in *Rooney*, was simply that respondents' conduct does not implicate the Due Process Clause. The standard of fault to be applied was not even reached because it was not necessary for the Eleventh Circuit to do so. This is consistent with this Court's recognition in *Parratt* and *Paul* that motor vehicle accidents involving public officials do not trigger the protections of the Due Process Clause in the absence of some purposeful conduct which is directed at the person

injured. Thus, there is no split among the circuits that needs to be resolved by the Court.

CONCLUSION

Petitioners have not presented any compelling reason why the Court should grant the petition, as required by Rule 10. Accordingly, the Court should deny the petition.

Respectfully submitted,

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No. 10-262

Supreme Court, U.S.
FILED
DEC 9 - 2010
OFFICE OF THE CLERK

In the Supreme Court of the United States

WILLIAM WILCOX and SHIRLEY WILCOX, his Wife,
Petitioners,

v.

JEREMIAH FENN, OSCAR GILLIAM, and DOUGHERTY COUNTY, GEORGIA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONERS' REPLY BRIEF

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QUESTION PRESENTED

Whether the lower court correctly held – in conflict with this Court's decision in *Sacramento v. Lewis* and the views of eight other federal circuits – that a federal civil rights claim predicated on Fourteenth Amendment Substantive Due Process requires proof of an "intent to harm" (as opposed to "deliberate indifference" to a substantial, state-created risk of severe injury or death) when the government official had an adequate opportunity to deliberate about the constitutionality of his conduct and where the official's conduct served no legitimate governmental objective.

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REASONS FOR GRANTING THE PETITION

In their opening brief, Petitioners identified three reasons why *certiorari* should be granted – (1) the decision below conflicts with this Court's decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), thus warranting summary reversal, (2) alternatively, if *Lewis* does not justify summary reversal, the split among the federal courts of appeal over the proper culpability standard established by *Lewis* warrants plenary review, and (3) this petition presents an ideal vehicle for the court to elaborate on the meaning of *Lewis*. Respondents dedicate most of their brief to rebutting the first proposition, address the second only in passing, and do not contest the third at all. Ultimately, none of their arguments diminishes the appropriateness of either summary reversal or plenary review.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *LEWIS* AND WARRANTS SUMMARY REVERSAL.

Respondents argument (at 4-11) that the decision below does not conflict with *Lewis* has two strands. First, citing several of this Court's decisions, Respondents argue that § 1983 was not designed to turn the Due Process Clause into a vehicle for garden-variety torts. Second, Respondents maintain that only those actions involving deliberate misconduct, not misconduct entailing any less culpable mental state, are cognizable under § 1983 as a violation of the Due Process Clause. Both of these arguments belittle the true scope of *Lewis*.

First, this Court has cautioned against turning the Fourteenth Amendment into a "font of tort law," *Paul v. Davis*, 424 U.S. 693, 701 (1976), but the Due Process Clause, especially its substantive component, is a more important, far deeper, constitutional well than ordinary tort law. Indeed, the substantive component of the Due Process Clause is the final constitutional rampart protecting citizens from arbitrary abuses of official power. Its lineage traces back at least to the Magna Charta, *see e.g.* ***Ingraham v. Wright***, 430 U.S. 651, 672-673 (1977); ***Lewis,*** 523 U.S. at 845, citing ***Bank of Columbia v. Okely,*** 17 U.S. 235, 4 Wheat. 235-244, (1819); and ***Hurtado v. California,*** 110 U.S. 516, 527 (1884); and the Glorious Revolution of 1688. John Locke, in his famous *Second Treatise on Government*,[1] expounded the philosophical justification of that revolution derived from an opposition to the tyranny of arbitrary power wielded by previous English monarchs. Locke described tyranny as follows:

> . . . [T]yranny is the exercise of power beyond right, which nobody can have a right to; and this is making use of the power any one has in his hands, not for the good of those who are under it, but for his own private, separate advantage. When the governor, however entitled, makes not the law, but his will, the rule, and his commands and actions are not directed to the preservation of the properties of his people, but the satisfaction of his own

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[1] J. Locke, *Second Treatise of Government* (Great Books ed.) (*Second Treatise*).

> ambition, revenge, covetousness, or any other irregular passion.

(Locke, *Second Treatise* at ¶ 199)

In so doing, Locke defined the very nature of limited government which became the dominant philosophical basis of the American Revolution and the Constitution. *See, e.g.* ***City of Boerne v. Flores***, 521 U.S. 507, 540 (1997) (" . . . the background political philosophy of the age (associated most prominently with John Locke)") (Scalia, J., concurring in part).

Nearly 100 years after Locke, Sir William Blackstone repeated Locke's theory with its emphasis on the citizen's personal security and freedom from arbitrary power as if unquestioned fact. 1 W. Blackstone, *Commentaries on the Laws of England*, 38-44 (9th ed., 1783) (first published in four books from 1765 – 1769).

Thus the right to be free of executive abuses of official power is well established both within the historical understandings of "Due Process" predating and surrounding the Clause's adoption, and in this Court's modern jurisprudence on the subject. *See Lewis*, 523 U.S. 833, 846 (1998) (observing that "for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience"). *Lewis* is merely the most recent decision in that long line of precedent, and this case falls within that same tradition of actionable misconduct under the Due Process Clause.

Understandably, Respondents treat the Petition and the facts of this case as if they were nothing more

than an ordinary traffic accident, yet Respondents accepted Petitioners' Statement of the Case which shows, *inter alia*, (1) that Respondent Fenn was charged with vehicular homicide, (2) that the impact with Fenn's vehicle caused William Wilcox to lose control of his vehicle and caused William's severe injury and Milton's death, Pet. App. 28a, ¶ 22; 45a, ¶ 22, and (3) all Respondents admitted that Fenn and Gilliam's conduct "was an abuse of official power that is arbitrary in a constitutional sense." Pet. App. 34a, ¶ 38; 47a, ¶ 38. Respondents are also personally immune from tort liability under state law.[2] Thus, this is no garden-variety negligence case, but one of gross abuse of power by a government actor.

Second, while *Lewis* obviously required proof of "a purpose to cause harm unrelated to the legitimate object of arrest" in the context of a high-speed chase, the court was careful to state that a less culpable mental state still applied in cases involving a non-emergency setting where decisions need not be made in haste: "When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking." *Lewis,* 523 U.S. at 853.

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[2] Compare *Lewis*, 523 U.S. at n.1, where the court notes the officer was immune for "personal injury to or death of any person or damage to property resulting from the operation, in the line of duty, of an authorized emergency vehicle ... ***when in the immediate pursuit of an actual or suspected violator of the law.***" Cal. Veh.Code Ann. § 17004 (West 1971). (emphasis added), and O.C.G.A. § 33-92-3, which is broader and eliminates liability of any officer who "commits a tort involving the use of a covered motor vehicle while in the performance of his or her official duties ..." Wilcox claimed below that this section was unconstitutional under Ga. Const. Art. 1, § 2, ¶ 9(d), but the district court did not rule upon that contention.

A lesser standard would be all the more appropriate when the officer's conduct is advancing absolutely no legitimate law enforcement purpose (an uncontested proposition at this stage of the case).

Two familiar rationales justified the heightened culpability requirement in *Lewis* – (1) a recognition of the split-second decisions that officers must make in the field and (2) a desire not to deter officers in the discharge of their duties out of fear that they may risk civil liability. *Lewis*, 523 U.S. at 852-853. Tellingly, in *Lewis*, those considerations did not cut off a claim entirely, but, instead, necessitated that the plaintiff plead and prove "a purpose to cause harm unrelated to the legitimate object of arrest." *Lewis*, 523 U.S. at 836. Logically, where those considerations are lacking entirely, as here, a less culpable mental state must apply because no countervailing or competing state interests justify the conduct giving rise to the substantial risk of state-created severe injury or death. Under Respondents' reading of *Lewis*, however, the exact same mental state applies in both sets of cases. The distinction made in *Lewis* between prison riot cases, analogized to the police chase case, and prison officials who are deliberately indifferent to the medical needs of their prisoners gives the ax to Respondents' argument and the Eleventh Circuit's holding below. *Id.* at 849-850; 852-853.

II. IF *LEWIS* DOES NOT WARRANT SUMMARY REVERSAL, THEN *CERTIORARI* IS APPROPRIATE TO RESOLVE THE WIDENING CONFLICT BETWEEN THE ELEVENTH CIRCUIT'S DECISION BELOW AND THE OTHER FEDERAL APPELLATE COURTS ABOUT THE SCOPE OF THE *LEWIS* "INTENT TO HARM" RIJLE.

Respondents dedicate the remainder of their brief (at 11-14) to the argument that the decision below does not conflict with the decision of other federal appellate courts. This argument also has two facets. First, Respondents claim that the cases cited in the petition involve factually distinguishable settings. Second, relying on decisions from the Fifth and Seventh Circuit, Respondents claim that regardless of the split the Eleventh Circuit simply concluded that the conduct in this case is not sufficiently egregious. Both of these arguments are wrong.

First, Respondents' emphasis on the factual distinctions between this case and those cited in the petition entirely misses the point. A consistent theme across all of those cases is that the courts, when confronted with either a non-emergency setting or an abuse of official power without any legitimate purpose, held that a less culpable mental state (such as deliberate indifference) applied to the claim. Those holdings applying the lesser culpability standard did not turn on the specific factual setting such as a student suicide or off-duty drinking. Rather, the salient fact was that the officer had an adequate opportunity to deliberate before engaging in the conduct that resulted in the injury to the plaintiffs.

This case, as it comes to this Court, shares that essential, and admitted, fact. Pet. App. 27a, ¶18; 45a, ¶15—18. Consequently, under all of the decisions cited by the petition, there is every reason to believe that the result would have been different in the other circuits (and conversely, those cases would have come out differently under the Eleventh Circuit's crabbed rule). That is the hallmark of a classic split on a pure question of law that warrants plenary review

Second, far from supporting Respondents' position, the Fifth and Seventh Circuit decisions actually support Petitioner's case for *certiorari*. *See Daniels v. City of Dallas*, 272 Fed. Appx. 321 (5th Cir. 2008) (*per curiam*); *Hill v. Shobe*, 93 F.3d 417 (7th Cir. 1996). In its unpublished decision in *Daniels*, the Fifth Circuit applied the deliberate indifference standard to a case involving an accident with police responding to a non-emergency call (unlike the Eleventh Circuit, the Court expressly declined to decide whether the *Lewis* "intent to harm" standard applied in that setting). Similarly, in *Hill* (a decision predating *Lewis*), the Seventh Circuit also applied a deliberate indifference standard to a case involving an accident in which police entered an intersection. Thus, if relevant, these cases re-enforce how much of an outlier the court below was when it applied the "intent to harm" standard. Not only were the officers in this case (as in *Daniels* and *Hill*) not responding to an emergency call, they were affirmatively abusing their power by driving at a breakneck speed, in tandem, for an extended period of time, with absolutely no lawful purpose justifying their conduct. And, once they arrived at their destination they were to prevent private citizens from doing exactly what they had just done!

Put simply, if the decision below does not flatly contradict *Lewis*, it certainly cries out for plenary review in order to explicate the scope of the "intent to harm" standard. *Lewis* was decided twelve years ago, and in that time the circuit courts of appeal and the district courts have struggled mightily to apply *Lewis* to various claims involving police or government actor misconduct. A Westlaw Keycite search of *Lewis* reveals sixty-four decisions that either decline to extend, distinguish or recognize a limitation in the holding of *Lewis*.[3] In total, *Lewis* has been cited over 3400 times in court decisions[4] and in over 1000 secondary sources.

Clearly, *Lewis* did not mean for the intent to harm standard to apply to all cases of police operating motor vehicles. *Lewis*, 523 U.S. at n. 5, 842. That and the other discussion of when a lesser standard applies has led the Circuit Courts of Appeals[5] to split on the proper standard to be applied when government actor misconduct is the result of an opportunity for deliberation without haste, but the Eleventh in this and other cases has nevertheless held that even when the government actor has ample opportunity for deliberation without haste and his or her conduct otherwise meets the reckless indifference standard,

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[3] Some of these decisions deal with whether the constitutional issue should be decided before the issue of qualified immunity, so those do not address directly the culpability standard for substantive due process claims.

[4] See note 1.

[5] The Fourth Circuit has not yet explicitly ruled on the issue.

the plaintiff must still allege and prove the actor's intent to harm the plaintiff specifically.

CONCLUSION

The conflict between the decision below and *Lewis* and the Circuit Court of Appeals' decisions is acute, longstanding and deserving of this court's review. For the foregoing reasons and those set forth in the petition, a writ of *certiorari* should be granted.

Respectfully submitted,

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December 9, 2010